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No. 73-592

In the Supreme Court of the United States

OCTOBER TERM, 1973

LOUIS GUIDO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1973

NO.

LOUIS GUIDO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Louis Guido, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Order Below

The order of the Court of Appeals, not yet reported, is reprinted as App. A, *infra.*

Jurisdiction

The judgment of the Court of Appeals was entered on July 16, 1973. Petition for rehearing was denied on Sept. 4, 1973 (App. B). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Was petitioner deprived of due process of law because of total insufficiency of the evidence to support the jury's verdict of conviction upon each of the five counts; and, more particularly, may his convictions be permitted to stand where the trial judge, in a separate bench trial of a co-indictee, upon the stipulated evidence from petitioner's trial, acquitted said co-indictee in a decision making specific factual findings irreconcilably contrary to the jury's verdict as to those counts on which petitioner was convicted?

2. Was petitioner's right to due process of law violated where there was neither proof of actual or constructive possession of narcotics, nor proof of knowledge of illegal importation, but where the jury was nonetheless instructed that petitioner could be convicted of illegal possession of narcotics; moreover, was such jury instruction fatally erroneous for failure to clarify that proof of possession merely permits, but does not require, a finding of knowledge of illegal importation, contrary to the requirements of due process and in conflict with pertinent instructions required in other federal circuits?

3. Were petitioner's rights under the Sixth Amendment and under the Jencks Act violated by failure of a government agent, who testified against petitioner at trial, to make any notes of his alleged observations, and by the destruction of notes by another such agent, thus precluding petitioner from meaningful cross-examination?

4. Did the trial court commit reversible error by precluding the jury, in advance, from the opportunity to in-

quire about portions of the evidence in petitioner's lengthy trial, about which it may have needed its recollection refreshed, particularly in view of the voluminous testimony and evidence of record and the paucity of competent evidence against petitioner; more particularly, did such spontaneous instruction by the court constitute an abdication of the responsibility to exercise judicial discretion?

5. Did the trial court's denial of petitioner's motion for new trial based on newly discovered evidence constitute an abuse of discretion, where the newly discovered evidence conclusively established the falsity of certain government evidence, and subsequently was taken as true by the trial court in the bench trial of petitioner's co-indictee which resulted in said co-indictee's acquittal; and may petitioner's convictions be permitted to stand, consistent with due process of law, under such circumstances?

6. Was petitioner deprived of meaningful appellate review in violation of due process, where the Court of Appeals, by way of an unpublished "order" rather than a published opinion, decided matters of substantive constitutional import summarily in favor of the government and against petitioner, without discussion of petitioner's properly raised arguments and authorities.

Constitutional Provisions and Statutes

The Fifth Amendment to the Constitution of the United States provides, in pertinent part:

> "No person shall . . . in any criminal case . . . be deprived of life, liberty, or property, without due process of law. . . ."

The Sixth Amendment to the Constitution of the United States provides, in pertinent part:

> **"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."**

21 U.S.C. 174 provides, in pertinent part:

> **"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States . . . contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. . . .**
>
> **"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."**

Rule 28, Rules of the United States Court of Appeals for the Seventh Circuit, provides as follows:

> *Circuit Rule 28.* (The following rule is the Plan for Publication of Opinions of the Seventh Circuit promulgated pursuant to resolution of the Judicial Conference of the United States):
>
> *Policy*
>
> It is the policy of this circuit to reduce the proliferation of published opinions.

Publication

The Court may dispose of an appeal (1) by an order or (2) by an opinion, which may be signed or per curiam.

Orders shall not be published and opinions shall be published.

"Published" or "publication" means:

(1) Printing the opinion as a slip opinion;

(2) Distributing the printed slip opinion to all federal judges within the circuit, legal publishing companies, libraries and other regular subscribers, interested United States attorneys, departments and agencies, and the news media;

(3) Permitting publication by legal publishing companies as they see fit; and

(4) Unlimited citation as precedent.

Unpublished orders:

(1) Shall be typewritten and reproduced by copying machine;

(2) Shall be distributed only to the circuit judges, counsel for the parties in the case, the lower court judge or agency in the case, and shall be available to the public on the same basis as any other pleading in the case;

(3) Shall be available for listing periodically in the Federal Reporter showing only title, docket number, date, district or agency appealed from with citation of prior opinion (if reported) and the judgment or operative words of the order such as "affirmed," "enforced," "reversed," "reversed and remanded," and so forth.

(4) Shall not be cited as precedent (a) to any federal court within the circuit in any written document or in oral argument or (b) by any such court for any purpose, except to support a claim of res judicata, collateral estoppel or law of the case.

Guidelines For Method Of Disposition

Published opinions:

Shall be filed in signed or per curiam form in appeals which

(1) Establish a new or change an existing rule of law;
(2) Involve an issue of continuing public interest;
(3) Criticize or question existing law; or
(4) Constitute a significant and non-duplicative contribution to legal literature.
(a) by a historical review of law;
(b) by describing legislative history; or
(c) by resolving or creating a conflict in the law.

Unpublished orders:

(1) May be oral and delivered from the bench, which shall be recorded by the Clerk of the Court, or in writing with only, or little more than, the judgment rendered, in appeals which
(a) are frivolous or
(b) present no question sufficiently substantial to require explanation of the reasons for the action taken, such as where
(i) a controlling statute or decision determines the appeals;
(ii) issues are factual only and judgment appealed from is supported by evidence;
(iii) order appealed from is non-appealable or this Court lacks jurisdiction or appellant lacks standing to sue; or

(2) May be in writing and contain reasons for the judgment but ordinarily not a complete nor necessarily any statement of the facts, in appeals which

(a) are not frivolous but

(b) present arguments concerning the application of recognized rules of law, which are sufficiently substantial to warrant explanation but are not of general interest or importance.

Responsibility For Determining Whether Disposition Is To Be By Order Or Opinion

The determination to dispose of an appeal by unpublished order or published opinion shall be made by a majority of the panel rendering the decision.

The requirement of a majority represents the policy of this circuit. Notwithstanding the right of a single federal judge to make an opinion available for publication, it is expected that a single judge will ordinarily respect and abide by the opinion of the majority in determining whether to publish.

Effective Date

The effective date of this rule is February 1, 1973.

STATEMENT OF THE CASE

Petitioner, Louis Guido, was tried alone. He was named in an indictment returned March 5, 1971 (71 CR 221) and charged with having violated the narcotic laws, 21 U.S.C. 174. The indictment was in 12 counts; but Guido was named only in 5.

In Count 1 he was charged with conspiracy to violate the narcotic laws with alleged co-conspirators, Franklin and Michael Carioscia, and Rudolph Piemonte, in that he conspired with those three men to receive and sell narcotics after he knew the same was imported illegally into the United States (A. 1).[1] In Count 6, he was charged with the

[1] "A" refers to the printed Appendix to Petitioner's Brief filed in the Court of Appeals for the Seventh Circuit, No. 72-1782; "R" refers to the Record on Appeal filed therein; "Tr." refers to the transcript of proceedings.

Carioscias and Piemonte with selling heroin on October 14, 1970 to Dave Harris, Jr., not in pursuance of a written order form, in violation of 26 U.S. Code, 4705(a); and Count 7 charged he possessed the same narcotics on October 14, 1970, knowing it to have been imported into the United States contrary to law in violation of 21 U.S. Code 174. (A. 1). Counts 10 and 11, respectively, charged Guido with the sale of heroin to Harris and with possession of the same heroin on January 20, 1971. (A. 2).

Counts 2 and 3 charged the Carioscias with selling to Harris and possessing the narcotics on August 19, 1970; Counts 4 and 5 charged Franklin Carioscia alone with selling heroin to Harris and possessing same on September 2, 1970; Counts 8 and 9 charged the Carioscias with selling to Harris and possessing the same heroin on December 4, 1970; and Count 12 charged the Carioscias with possessing a quantity of heroin on February 23, 1971. (A. 1-2).

Before Guido's trial, the Carioscia brothers pled guilty. Piemonte had not yet been arrested at the time of the return of the indictment or at the time of Guido's trial; he surrendered sometime after the Guido trial. His surrender and the revelations of his whereabouts in Mexico on January 19, 1971, gave rise to Guido's post-trial motion for new trial, inasmuch as two agents had testified they had seen Piemonte in Chicago on January 19, 1971, whereas, in fact, Piemonte was in Mexico, as the stipulated proof at Piemonte's trial showed.

Piemonte went to trial before Judge McMillen (the same trial judge as in the case at bar) on the stipulated evidence of the transcript of the Guido trial, together with certain affidavits demonstrating Piemonte's absence from Chicago in January, 1971.

The trial judge denied Guido's motion for acquittal; *on the identical facts,* the court acquitted Piemonte of the possession or sale of narcotics on October 14, 1970 (Counts 6 and 7).[2]

Petitioner's motions to dismiss certain of the counts of the indictment for duplicity and for a severance from those counts where he was not named were denied on August 25, 1971. (R. 15-16). Trial commenced before the Hon. Thomas R. McMillen on February 14, 1972 and continued to February 22, 1972, when the jury returned its verdict finding petitioner guilty on those counts in which he was named in the indictments, Counts 1, 6, 7, 10 and 11. Petitioner's motion for judgment of acquittal notwithstanding the verdict was denied; as likewise was his motion for a new trial on the grounds of newly discovered evidence. Petitioner was sentenced on June 19, 1972 to 20 years on each of the several counts, the sentences to run concurrent. (R. 34).

Statement of the Facts.

Prefatory Statement

All sales of narcotics on all dates set out in the indictment were made to a government paid informer, Dave Harris, Jr., by either Frank or Michael Carioscia, brothers. At no time, on any of the dates in question, was defendant Guido present at or near any of the sales, nor was there any testimony that he participated in the negotiations for said sale. Neither was there any testimony that he ever possessed any of the narcotics involved in the case.

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[2] A copy of the trial judge's decision and order acquitting Piemonte is set forth as Appendix C to this Petition.

Defendant continuously objected to testimony by Harris and the narcotic agents of the events which occurred on dates other than those for which Guido was named in the indictment, for Guido was charged only with selling or possessing narcotics on October 14, 1970 and January 20, 1971. The court allowed all such testimony to be received by the jury during the presentation of the government's case, upon the government's assertion that it would "connect up the events" (A. 5, 6). At the conclusion of the government's case, the court permitted the jury to consider the entirety of the evidence presented and overruled defendant's motion for mistrial. (A. 43).

The government's proof was made by testimony of a paid informer, Dave Harris, Jr. (A. 12) working under the close supervision and observation of the various narcotic agents. All of his negotiations for narcotics were either with Franklin or Michael Carioscia.

The evidence is set out in Appendix D, hereto.[3]

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[3] Because this Petition is largely grounded on the argument that the evidence was so insufficient as to render petitioner's convictions violative of due process of law, it is necessary to set forth the evidence in considerable detail. We do so in Appendix D, hereto.

REASONS FOR GRANTING THE WRIT

1.

The evidence was totally insufficient to support any of the five counts on which petitioner was convicted, depriving petitioner of due process of law. Moreover, his convictions must not be permitted to stand where the trial judge who presided at petitioner's jury trial, in a separate bench trial of a co-indictee upon the stipulated evidence from petitioner's trial, acquitted the co-indictee in a decision making specific factual findings irreconcilably contrary to the jury's verdict in defendant's case. Certiorari should be granted to reiterate the due process requirement of sufficient evidence to support conviction, and to review the complex problem arising where, as here, separate co-indictees are tried by jury and by the court, respectively, and the jury's verdict and the Judge's ultimate finding on the identical facts as to guilt or innocence are inconsistent (the latter aspect apparently presenting a question of first impression).

A.

Insufficiency of Evidence

> "Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In Re Winship*, 397 U.S. 358, 364.

Moreover, this Court has definitively held that a conviction devoid of evidentiary support is violative of due process of law, in *Thompson* v. *City of Louisville*, 362 U.S.

199, 204. See also *Gregory* v. *City of Chicago,* 394 U.S. 111, 112; *Johnson* v. *Florida,* 391 U.S. 596, 598.

We submit that lack of evidence against petitioner renders his convictions violative of due process.

Prefatory Statement

The government acknowledged that there was no proof of possession of narcotics, constructive or otherwise, shown against Guido. The government also acknowledged there was no proof it made that defendant knew the narcotics were illegally imported into the United States.

The government bottomed its entire case on the theory that a conspiracy was shown between petitioner and the Carioscia brothers—and, we suppose, Piemonte, also. For the government relied wholly on the conspiracy concept: "If we don't show a conspiracy, then apparently we don't have a case." (A. 5). And proof that Guido was "the source" of narcotics depends upon "where Mr. Guido was seen with respect to the acts as they occurred." (A. 42).

If ever a case demonstrated the warning set out by Mr. Justice Jackson in *Krulewitch* v. *United States,* 336 U.S. 440, 453, this is it.

And to Justice Jackson's caveat, we must add that it would be a violent principle to pile inference upon inference in order to guess or speculate a fact intended to be proven. *Causey* v. *United States,* 352 F.2d 203, 207 (5 Cir. 1965).

There is one further rule of conspiracy law with which we preface our prospective analysis of the evidence and legal argument thereon, and that is, that mere association with some conspirators is insufficient to make a person a participant in the alleged conspiracy. *United States* v. *Ma-*

loney, 200 F.2d 344, 347 (7 Cir. 1952); *United States* v. *Hickey,* 360 F.2d 127, 138-39 (7 Cir. 1966); *United States* v. *Falcone,* 311 U.S. 205; *Jong* v. *United States,* 245 F.2d 392, 394 (9 Cir. 1957); *Panci* v. *United States,* 256 F.2d 308, 312 (5 Cir. 1958).

And lastly, this Court has declared that an intent to participate in a conspiracy may be inferred from knowledge of the conspiracy, ". . . . but the evidence of knowledge must be clear, not equivocal." *Ingram* v. *United States,* 360 U.S. 672, 680.

The Evidence Does Not Admit of Any Proof of Conspiracy Beyond A Reasonable Doubt.

The jury was certainly confused as to what they were to consider in determining the case.[4] When the defendant objected to acts and statements made by the Carioscias to Harris, and he to them, regarding events which occurred in August and September of 1970, the court overruled defendant's objections, and allowed the physical evidence of narcotics to be received into evidence and to be considered by the jury (A. 43). The government's closing argument also referred to the August and September, 1970 Carioscia-Harris transactions (Tr. 1013, 1016, 1017, 1018).

The appeals court likewise was confused, for it too considered against petitioner evidence concerning transactions which occurred prior to the earliest possible connection of petitioner with the case. (See App. A, pp. 2, 5-8).

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[4] During their deliberations, the jury inquired whether they were to construe the indictment as beginning on October 14, 1970 as to Guido, as opposed to August 1, 1970 as stated in the indictment. (A. 1). The court replied in the affirmative. (A. 49).

The October 14, 1970 incident

And now enter the sinister events involving Guido on October 14, 1970. Around 9:00 a.m. Guido left his apartment at 633 South Laflin Street, Chicago, and walked a block south, to his place of employment, Del's Restaurant, at Lexington and Laflin Streets (A. 17). Five minutes later, Rudolph Piemonte, alleged co-conspirator, left Del's Tap with Guido and entered Guido's apartment building. As they walked the block, they are witnessed in conversation with arms waving in gesticulation (A. 17-18). This is to show, like the stage magician, that there was nothing in Piemonte's hands when he went into Guido's apartment and, we suppose, nothing up his sleeve, either. But when they left Guido's apartment, a few minutes later Piemonte was seen carrying a small brown bag not unlike a million other bags (A. 19); Guido waves and gesticulates, whereupon Piemonte rolls the bag and puts it under his arm. (A. 18) Piemonte goes to his mother's house at 1437 Flournoy Street (A. 19) and Guido goes back to Del's Restaurant (A. 18).

The scene shifts to approximately 12 hours later. Frank Carioscia sells some narcotics to Harris for $8,000 (A. 8); the narcotics were in a brown bag which Frank Carioscia gave to Harris. The bag and its contents, heroin, were admitted into evidence, over objections, as Gov't Exhibit 3C (A. 43). No evidence the bag was given by Piemonte to Harris, none that Piemonte got it from Guido. But more important, no evidence was presented as to what was in the bag when Piemonte was waving it in the air on the street for all the agents to see (A. 18). And certainly, the agents had no roentgenological or

extrasensory capacities; they testified they could not tell what was in bags, when so asked. See, *i.e.*, A. 33.

The transaction between Harris and Frank Carioscia on October 14, 1970 was the basis for Guido's convictions on Counts 6 and 7, charging Guido with selling heroin *to Harris*, and further charging that Guido possessed the narcotics on that date, knowing the same to have been illegally imported (A. 1).

No fingerprints of Guido were shown to be on the bag—or its contents. There was not even a showing that the brown bag delivered by Frank Carioscia to Harris around 8:30 p.m. on October 14 was the same bag as *Piemonte* possessed at 9:00 a.m. that morning—much less that there were any narcotics in the bag Piemonte is supposed to have waved in the air for all to see.[5] By what alchemist's wild stretch of even the government's imagination is Guido charged with the possession of the narcotics sold to Harris—or with the sale on October 14, 1970? The sufficient and short answer should be *Panci* v. *United States*, 256 F.2d 308 (5 Cir. 1958). That case, too, is a "brown bag" case. The Fifth Circuit stated, in reversing:

> "[I]n circumstantial evidence cases this court has without wavering declared that the test to be applied is whether the jury might reasonably find that the evidence excluded every reasonable hypothesis except

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[5] Indeed, the trial judge, in acquitting Piemonte, specifically concluded that there was no such proof. (See Part C of Point I, *infra;* App. C, p. 14.)

that of guilt, and has equally without wavering applied it." *Id.* at 312.[6]

In *Panci*, the testimony about "a brown bag" was more incriminatory than in the case at bar. There was testimony that an agent saw one, Giardina, go into a place where he spoke to Panci:

> "That he saw Panci and Giardina leave the store; that he saw them sit on stools next to each other at the Toddle House cafe; that while they were sitting there drinking coffee, the defendant withdrew his left hand from his pocket and passed a small brown paper bag behind his back to Giardina; and that they thereafter left the Toddle House and returned to the barbecue stand. It is true, too, that there was testimony: that Panci gave Giardina $1,050 for the purchase of three ounces of heroin; and that sometime afterward Giardina went into his own house and took one ounce of heroin from the total of three in a brown paper bag. The record does not support the government's contention that the brown paper bag from which the heroin was taken was identified by anyone as the one given Giardina by defendant. If it did, this would not be important. *What is impor-*

[6] In anticipation of the prosecution argument, raised and apparently adopted below, that neither the Fifth Circuit nor any other presently follows this formulation, see *United States* v. *Warner*, 441 F.2d 821, 825 (5 Cir. 1971); *United States* v. *Davis*, 443 F.2d 560, 564 (5 Cir. 1971); *United States* v. *Restano*, 449 F.2d 485, 488 (5 Cir. 1971); *United States* v. *Willoz*, 449 F.2d 1321, 1323 (5 Cir. 1971); *United States* v. *Bullock*, 451 F.2d 884, 891 (5 Cir. 1971); see also *United States* v. *Hickey*, 360 F.2d 127, 136 (7 Cir. 1966). This Court's decision in *Holland* v. *United States*, 348 U.S. 121, 139-140, is not to the contrary, for that ruling was only that the jury need not specifically be so instructed. That such rule still should be utilized by reviewing courts in determining the sufficiency of the evidence, however, is clear.

> *tant here is that no one testified that the brown paper bag given* Giardina by defendant had narcotics in it when it was given to him. In short, the testimony of the government agent that Giardina was seen with Panci and that Panci passed a paper bag to him was wholly insufficient to establish his guilt. While, therefore, the testimony of the government witness well served its purpose of smearing Panci because he was seen associating with Giardina, no evidence whatever was offered to support its claim that Giardina or anyone else obtained heroin from Panci." (emphasis in original). *Ibid.*

The Court of Appeals in the case at bar failed even to mention the *Panci* case, although it was cited and discussed in Petitioner's Brief, pp. 23-24. (See Point 6, *infra.*) Thus the instant decision of the Seventh Circuit directly conflicts with decisional law of the Fifth Circuit.

The January 20, 1971 incident.

With respect to the events of January 20, 1971, the evidence is equally as substantially weak.

Guido was seen on the afternoon of January 19, 1971 with Michael Carioscia and with another man being driven to a drug store, and later being driven to an address, 631 S. Wells Street, Chicago, where a drug company had its offices. The third man went in and came out. There is naked any evidence as to what transpired.

Coming to January 20, 1971, the essential facts upon which the government relies is a sale of narcotics to Harris by Frank Carioscia. Guido is charged in Counts 10 and 11 with the sale and possession of the narcotics (A. 2). The sale took place in Harris' car on the corner

of Loomis and Flournoy Streets. Harris' car was parked on the southeast corner of those streets at about 7:30 p.m.[7]

At the time when Carioscia alighted from Harris' car, he had a Carson Pirie Scott shopping bag, in which, at the narcotic bureau, $32,000 had been placed in a "Madigan" shopping bag (A. 14). Carioscia walked *south* on Loomis Street to Lexington (one block south of Flournoy Street) and then he turned west on Lexington Street. Even though there were about 15 agents in the area (A. 30), Carioscia was lost from everybody's view for about ten minutes, from about 7:35 to 7:45 p.m. (A. 30). His father's house was located in about the middle of Lexington Street between Loomis and Laflin Streets (A. 29). Laflin is one block east of Loomis Street. No agent testified to Carioscia's whereabouts for those ten minutes (A. 30).

Carioscia was next seen coming from Lexington onto Laflin, walking north on Laflin to the area, 633 S. Laflin Street and was seen by an agent standing in front of the Guido residence with a Carson Pirie Scott shopping bag in hand (A. 28). Absolutely no evidence as to what was contained in the bag at that time.

Carioscia was seen ten minutes later exiting the 633 S. Laflin area, at which time he was not carrying anything (A. 28).

He walked to his car at 810 S. Loomis Street, and then drove to Turzitti's tavern at 1121 S. Racine, and entered at about 8:10 p.m. (A. 35). At first, Frank was at the east end of the bar, then he joined Guido and two females

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[7] Harris testified the event took place, he was certain, at about 8:00 p.m. (A. 12); but all agents who testified on this point contradicted him as to the time (A. 15, 28, 32).

who were drinking at the bar (A. 35). Agents testified that Guido gave Carioscia some money from "a large roll of bills" which Guido took from his pocket (A. 36, 39). One agent, Thompson, testified he overheard Guido ask Frank, "How did it go?", to which Frank replied, "Okay." (A. 39).

The parties left the tavern at about 8:45 p.m., with Carioscia driving Guido home to 633 S. Laflin (A. 29).

No search was made of Guido's apartment for the Carson Pirie Scott bag or for the $32,000 (A. 16). No marked money or narcotics was ever found in his home or on his person when Guido was arrested on February 24, 1971. (A. 29).

Just as in *Montoya* v. *United States,* 402 F.2d 847 (5 Cir. 1968):

> "There is ample cause for suspicion and conjecture in this case, but suspicion and conjecture are not sufficient to sustain a conviction. In our view, the jury was not justified in reaching a verdict of guilty, even though they accepted the Government's evidence as true and accorded the full weight. All of the evidence against Montoya is circumstantial. In order to sustain a conviction in circumstantial evidence cases, the inferences to be drawn from the evidence must not only be consistent with guilt, but inconsistent with every reasonable hypothesis of innocence . . . (Citing cases)." *Id.* at 850.

In *Washington* v. *United States,* 357 U.S. 348, in a *per curiam* opinion, this Court reversed for insufficiency of evidence the conviction affirmed by the Seventh Circuit (Judge Duffy dissenting) in *United States* v. *Washington,* 253 F.2d 913 (7 Cir. 1958). In *Washington,* an informer telephoned the defendant at an agent's request. He asked for heroin, and told the agent after the con-

versation that the defendant would deliver. Within minutes, the defendant was seen by agents leaving his residence with a co-defendant, who, an hour after the telephone conversation, delivered heroin to the informer's apartment. In dissent (which became the law of the case), Judge Duffy stated:

> "No matter how vile or disgusting the charged criminal offense may be, the defendant thus charged still must be convicted by evidence that is convincing beyond a reasonable doubt."

To similar effect see *Jensen* v. *United States,* 403 F.2d 1018 (9 Cir. 1968).

In *United States* v. *Landry,* 257 F.2d 425 (7 Cir. 1958) the court, in reversing, stated:

> "In fact, the government is quite liberal with its speculative suggestions. It is suggested that the relationship between Dolores and Landry makes it entirely probable that Landry had placed the narcotics where they were found. Again, it is suggested that the bond of affection existing between Dolores and Landry might well result in a situation like the one found to exist. *We reject the idea that speculation can be employed as a substitute for proof* . . . (Id. at 431).
>
> "Congress has created a presumption upon proof of the existence of a fact, and now the government would have the Court presume the fact." (*Id.* at 432; emphasis added)

A somewhat stronger case on facts than in the case at bar, but yet reversed for insufficiency of evidence, is *Ong Way Jong* v. *United States,* 245 F.2d 392 (9 Cir. 1957).

The Ninth Circuit, in reversing, said that as to Ong, "there is a strong suspicion that he was" dealing in narcotics.

> "The agents followed Wee during all of the negotiations relating to the sale of February 1. They saw Wee meet no one but Ong when Wee brought the narcotics back for sale. They saw Wee go to meet Ong immediately after he got the money for the sale. In each instance during the negotiations of the sale of February 1, when Wee said he was going to meet his 'connection', he met Ong. All this sounds quite convincing, and undoubtedly the agents themselves were convinced and convinced the learned trial judge that Ong was guilty." (*Id.* at 396).

But it was held there was insufficient proof.

In *Diaz-Rosendo* v. *United States,* 364 F.2d 941 (9 Cir. 1966), the Court reversed a conspiracy conviction for smuggling marijuana into the country, stating that the evidence must establish guilt beyond a reasonable doubt, even if circumstantial. "Guilt cannot be established by mere association." 364 F.2d 941, 944. To the same effect see *United States* v. *Falcone,* 311 U.S. 205, 210.

Link v. *United States,* 352 F.2d 203 (5 Cir. 1965), spells out the requirements to show a conspiracy:

> "Many of the principles of the law of conspiracy are too well established to require elaboration here. We enumerate a few which are of particular applicability to a case of the kind now to be decided. To establish the intent essential to a conviction for conspiracy the evidence of knowledge must be clear and not equivocal. A suspicion, however strong, is not proof. Charges of conspiracy are not to be made out by piling inference upon inference. Guilt of conspiracy may not be inferred from mere association. It is true that the proof may be circumstantial or direct or both, but it must convince beyond a reasonable doubt that a conspiracy existed, that the defendant knew it, and with that knowledge intentionally did some act or thing to further or carry on that conspiracy." *Id.* at 207.

The government's reliance on the "source"

The "source" of the narcotics, according to the government's theory as announced to the court and to the jury, was Guido. There is no proof of this except by braiding inference upon inference, and except by emasculating firm principles of criminal law and due process which require proof of the act charged. *Cf. Thompson* v. *City of Louisville,* 362 U.S. 199. The government almost forgot to remind its informer witness what he was supposed to say in connection with this most important issue—the crux of its case—according to the government prosecutor. (A. 5, 42). Harris was describing his activities with the Carioscias on January 19, 1970. Harris and Michael Carioscia talked about a prospective narcotic transaction and Harris described the conversation between him and Michael. The following occurred:

> "Q. (The prosecutor) Do you recall any other conversation?
>
> A. (Harris) I don't remember.
>
> Q. Let me ask you this: Did you have some conversation with respect to Mr. Carioscia's sources?
>
> A. I asked him if he was getting it from the same people as before.
>
> Q. Getting what?
>
> A. The heroin and cocaine.
>
> A. He said he was getting the heroin, but he had a different source for the cocaine." (A. 10)

Whatever this equivocation meant, it was interpreted by the government, and by the Court of Appeals (App. A, pp. 4-5) to mean that Guido was the "source" of the narcotics for the Carioscias. But there was no proof, as the trial judge himself pointed out (A. 42) that Guido had been any "source" prior thereto. For when petitioner objected to government exhibits being received into

evidence, which exhibits related to the Carioscia-Harris transactions in August and September of 1970, the court asked the government the basis for their admittance into evidence. The court said that the "source could be anybody", and "How do you tie Mr. Guido into being the source?" (A. 42) The only response by the government was that Guido was the "source" because of where he "was seen with respect to the acts as they occurred." (A. 42)

But aside from there being a total failure of proof that Guido was the "source", except by the *ipse dixit* of the prosecutor's speculation, even so, Guido could not be charged with the sale of narcotics to Harris. See *United States* v. *Raysor,* 294 F.2d 563 (3 Cir. 1961).

Nor could Guido be charged in a conspiracy with the Carioscias if he were selling narcotics to them, because a seller and a buyer may not be charged in a conspiracy. See *United States* v. *Varelli,* 407 F.2d 735 (7 Cir. 1969); *United States* v. *Ford,* 324 F.2d 950 (7 Cir. 1963).

In reaching its verdict, the jury in the case at bar was permitted, if not encouraged, to engage in speculation, conjecture and surmise. The appellate court did likewise. As stated in *United States* v. *Freeman,* 286 F.2d 262, 266 (4 Cir. 1961), "there are suspicious circumstances, 'but evidence creating a mere probability of guilt or giving rise to a mere suspicion or conjecture of guilt is not sufficient'." In the case at bar, the inference of defendant's guilt was so tenuous as to amount to mere speculation. "[N]o conviction may stand upon mere speculation . . ." *United States* v. *Solice,* 332 F.2d 626, 628 (4 Cir. 1964).

On any ground then, the convictions herein should be reversed.

B. *Consideration by the jury and the Court of Appeals of incompetent, prejudicial evidence against petitioner.*

When the government commenced its proof and attempted to introduce its exhibits, an unusual situation arose. Large narcotic transactions occurred between the Carioscia brothers on the one hand, and the undercover agent, Harris, on the other, on several dates preceding any proof of petitioner Guido's alleged involvement. The trial court stated that he did not know why the government introduced evidence, over objections, about August and September 1970, transactions because "it is a rather tenuous connection." (A. 42) And the court was "bothered" about such evidence with respect to transactions earlier than October 14, 1970, and could see no way short of declaring a mistrial, because he did not know any other remedy. (A. 42-43)

There was no other remedy. But all the narcotic exhibits were admitted into evidence anyway, over objections. (A. 43)

But about two and one-half hours into deliberations, the jury sent out a question to the court: "Are we to construe Count 1 of the indictment to begin October 14, 1970 for Louis Guido as opposed to August 1, 1970 as stated in the first paragraph of Count 1 of the indictment?" (A. 49) The court advised the jury it was to consider the commencement as to Guide only beginning October 14, 1970. (A. 49)

The impossible imbroglio then created was that although previously, and with great reluctance and much misgiving the court allowed the narcotics of earlier transactions to be received in evidence for the jury's consideration, and although the prosecutor argued to the jury as to Guido's

responsibility as to the earlier transactions, the judge finally, midway in the jury deliberations told the jury, in effect, to consider only matters commencing with October 14, 1970. (A. 49) But if even the reviewing court mistakenly considered the earlier transactions, then perhaps the jury may be forgiven for using and considering improper and prejudicial evidence against Guido. For, the court of appeals recounted the narcotic sales on August 19, 1970 and September 2, 1970, for which Guido had no responsibility, and which the trial court in effect told the jury not to consider. (App. A, pp. 2-8).

The situation at the appellate level is not too different from the confusion engendered by the trial court in *United States* v. *Turnipseed,* 272 F.2d 106 (7 Cir. 1959). In a multiple defendant bench trial, certain confessions of co-defendants were used as against those defendants making them only, but not against Turnipseed. In reversing, the court stated:

> "Nevertheless, the learned trial judge considered them as evidence against this defendant. The judge stated Turnipseed talked about the checks during the time he drove the automobile. The only evidence of any such statement was in a co-defendant's confession which is not in this record so far as Turnipseed is concerned.
>
> "Where a number of defendants are tried together and evidence is received as to some but not as to the others, it usually is quite difficult for a trial judge to recall at the end of the trial just what evidence was used as against each of the defendants. In the case at bar, the trial judge erred in his recollection as to evidence which had been received against Turnipseed." *Id.* at 107.

* * *

Based upon the absence of sufficient competent evidence probative of petitioner's guilt, his convictions violate due process of law. Certiorari should be granted for this Court to examine and condemn the Seventh Circuit's decision to the contrary, based, as it is, upon consideration of incompetent evidence, suspicion and conjecture. In view of the affirmance by the appeals court, this Court should definitively enunciate the appropriate guidelines for trial and appeals courts to follow in evaluating evidence and in determining whether the evidence is sufficient to support conviction.

C. Inconsistency between the jury's verdict in the case at bar and the trial court's finding acquitting Piemonte.

In acquitting Piemonte with respect to conspiracy and substantive offenses on Oct. 12, 1970, the trial court had before it as evidence the stipulated evidence from petitioner's trial, and uncontradicted evidence that Piemonte was out of the country on Jan. 21, 1971, a date upon which, at petitioner's trial, agents had testified they saw Piemonte with petitioner in Chicago.

Piemonte's acquittal is wholly inconsistent with petitioner's convictions, as is evident from the trial court's decision and order acquitting Piemonte, set forth in full as Appendix C to this Petition, *infra*.

The government's proof (in both cases) was that on October 14, 1970, Piemonte went to Del's restaurant where Guido was employed and walked from the restaurant a block north to Guido's residence at 633 S. Laflin, Chicago. They emerged about five minutes later, at which time Piemonte held in his hand a small brown paper bag. When Guido pointed to the bag, Piemonte tucked it under his jacket. About 12 hours later, Frank Carioscia sold heroin in a brown paper bag to the government's special employee,

Harris. Judge McMillen's reasoning in finding Piemonte not guilty is identical to the argument set out in Guido's original Brief, p. 22. Judge McMillen stated that no one saw Piemonte give to either of the Carioscias any brown paper bag; and no conversations were overheard. "There is, in short, no evidence of what transpired at these brief meetings between Piemonte and Michael Carioscia or Piemonte and Guido." (App. C, p. 12). The trial judge further stated:

> "The purchase money which Franklin had received for the heroin that night was never recovered. The government apparently infers that Piemonte received money from Franklin after the sale and had previously given the brown paper bag of heroin to him at Del's restaurant at about 9:30 p.m. The difficulty with these assumptions is that they leave too much to speculation. There is no logical reasons for Piemonte to get heroin from Guido at 9:20 a.m. and carry it around all day for a sale which was arranged at 2:30 p.m. to be consummated that night. And there is no apparent reason for Piemonte to return to Guido's place of employment at 9:30 p.m., if he had received heroin from him at 9:20 a.m. If Piemonte did in fact have the heroin all day, as the government apparently contends, there is no reason why Franklin would postpone the sale from 8 p.m. to 10 p.m. in order to 'put the package together,' as he told the buyer.
>
> "It can be seen from the foregoing that the government's case against Piemonte boils down to inferring guilt by association. It is true that his association with a proven conspiracy on the date of an illegal sale is suspicious and difficult to account for rationally. But on the other hand he should not be convicted without some hard evidence that he knowingly participated in the conspiracy and sale, and the evidence does not convince me of this beyond a reasonable doubt." (App. C, p. 13)

By the same reasoning, and by the authority in *Panci* v. *United States*, 256 F.2d 308, 312 (5 Cir. 1958), another "brown bag" case, which was cited to the trial court, Judge McMillen should have granted defendant's motion for acquittal at least as to Counts 6 and 7—the counts on which the court found evidence lacking as to Piemonte.

Had the court done that, the jury could not even have asked the court the question that it did: whether or not they were to construe Count 1, the conspiracy count, to begin on October 14, 1970 for Guido. (A. 49)

Eliminated from the jury's consideration would be anything except the evidence of the sale by the Carioscias to Harris on January 20, 1971. Considering the nebulous circumstances of the government's case with respect to Counts 10 and 11, the counts charging sale and possession on January 20, 1971, and considering the necessity for the government in piling inference upon inference, inference upon presumption, presumption upon inference, and presumption upon presumption, the acquittal on counts 6 and 7 would necessarily have weakened the government's presentation to the jury on the conspiracy count and counts 10 and 11.

Yet another inconsistency, albeit not (as the previously discussed one) going to the very heart of the guilt or innocence question, involves Judge McMillen's determination during Piemonte's trial that there was not sufficient proof of his being in the United States on Jan. 21, 1971, [8] where-

[8] See Point 5, *infra*, for the argument that newly discovered proof of this discrepancy in the government testimony necessitated a new trial. While this is not as crucial a contradiction as is Piemonte's acquittal itself, evidence that government testimony was palpably erroneous might have completely turned the tide as to all counts in favor of petitioner.

as at petitioner's trial, agents had testified they observed Piemonte and petitioner together in Chicago on that date.)

The trial court held the interpretation of events of October 14, 1970 to be entirely circumstantial and that, further, the government was premising its case on "guilt by association." App. C, p. 13. In affirming Guido's conviction on less than these same facts as to the evidence of October 14, 1970, the panel, in the case at bar, stated—without any citation of authority—that ". . . a judge may properly find that the evidence is strong enough to submit to a jury even if he was not convinced beyond a reasonable doubt that the defendant is guilty." And, "Of greater significance, however, is the fact that his findings in the Piemonte case need not be consistent with his rulings in the Guido case." (App. A, p. 9)

But such determination is in conflict with long stated principles of law. In testing the sufficiency of evidence to support a judgment of conviction where the case is circumstantial, the court held in *United States* v. *Wroblewski,* 105 F.2d 444, 449 (7 Cir. 1939):

> "It has been held by a long line of decisions in substance that, unless there is substantial evidence of facts which exclude every other hypothesis than that of guilt, it is the duty of the trial judge to direct the jury to return a verdict for the accused, and where all the evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment against the accused."

Accord: United States v. *Standard Oil Co.,* 316 F.2d 884, 899 (7 Cir. 1963); *United States* v. *Fenwick,* 177 F.2d 488, 490, 492 (7 Cir. 1949).

In *United States* v. *Litberg,* 175 F.2d 20, 21 (7 Cir. 1949), the Court said:

> ". . . while the trier of the facts is entitled to draw all reasonable inferences from the circumstances in

> proof, a court of review is charged with the responsibility of determining the reasonableness of such inferences. In other words, an inference may not properly be relied upon in support of an essential allegation if an opposite inference may be drawn with equal consistency from the circumstances in proof. . . ."

And see, *United States* v. *Collon*, 426 F.2d 939, 942 (6 Cir. 1970): "However, if under such view of the evidence it is concluded there must be some doubt in a reasonable mind, the motion for acquittal must be sustained."

The Court's acquittal of Piemonte, of course, demonstrates such doubt. Yet the Seventh Circuit condones sending Guido's case to the jury on the same evidence.

The reviewing court's opinion here portends dangerous erosion of the very integrity of the judicial system. For example: Suppose a joint trial of two defendants, one of whom is tried by the court and the other by a jury, but before the same court. And assume identical evidence. What the court of appeals in the case at bar has stated is that although the trial judge may find one defendant not guilty because of insufficient evidence to overcome the burden of reasonable doubt, that he then has no legal obligation to direct the jury to acquit as to the other defendant. The anomaly is no less great where, as here, the bench and jury trials did not happen to be contemporaneous.

We fully recognize that inconsistent verdicts by a jury are permissible. However, those considerations which have led to evolution of this principle are inapplicable to the situation presented by the instant case. While no case was discovered presenting a similar problem, *i.e.*, inconsistency between a court's decision and a jury's verdict as to separate counts or defendants upon the same indictment, it has been judicially recognized that the reasons underlying

allowance of inconsistent jury verdicts do not apply to inconsistent findings by a judge sitting as the finder of fact, and consequently such inconsistent judicial findings are fatal to conviction.

In *United States* v. *Maybury*, 274 F.2d 899 (2 Cir. 1960), the trial court found defendant guilty of knowingly having uttered a forged check but not guilty of forgery; these findings were inconsistent on the facts. Recognizing that inconsistent jury verdicts are permissible (per *Steckler* v. *United States*, 7 F.2d 59 (2 Cir. 1925), and *Dunn* v. *United States*, 284 U.S. 390; see 274 F.2d at 901), the court nonetheless reversed since inconsistent findings by the court could not similarly be justified. *Accord, United States* v. *Tankel*, 331 F.2d 204 (2 Cir. 1964).

In enunciating its logic, the court in *Maybury* further held:

> "[W]e reverse for inconsistency . . . not because of any desire for *elegantia juris* but because we can have no confidence in a judgment convicting Maybury of one crime when the judge, by his acquittal of another, appears to have rejected the only evidence that would support the conviction here." 274 F.2d at 905.

Likewise, in the case at bar, there can be no confidence in the jury's guilty verdict against Guido where "the judge, by his acquittal of another, appears to have rejected the only evidence that would support the conviction here."

The reasons underlying permitting inconsistent jury verdicts favor the accused; they are based on "the jury's

assumption of the power to insure lenity." *Id.* at 903. A rule based on such reasons may not be permitted to act as a two-edged sword against the accused.

It does violence to all civilized concepts of justice and fairness to permit Guido's conviction by the jury to stand in the light of the judge's acquittal of Piemonte on the same facts.

Although discrepancy between a jury verdict and a court's finding appears never to have been judicially discussed in any reported case, the appeals court here summarily resolved this question against petitioner without citation of any logic, reasoning or authority. [9]

Certiorari should be allowed to permit this Court to consider and resolve the cardinal issues involved where a jury's verdict, and indeed, a trial court's rulings sending the case to the jury, are patently inconsistent on the facts, with the same court's rulings in a bench trial of a co-defendant.

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[9] Indeed, the court of appeals' decision to rule on the instant case by unpublished order rather than by published opinion, ostensibly pursuant to its Rule 28 (set forth in full at pp. 4-7 *supra*) seems to contravene that Rule's own "guidelines," in that decisions effecting a new rule of law are to be in published opinions.

2.

Petitioner's right to due process of law was violated where there was neither proof of actual or constructive possession of narcotics nor proof of knowledge of illegal importation, and the jury was nonetheless instructed that petitioner could be convicted of illegal possession of narcotics. Moreover, the court's instruction to the jury as to the presumption arising from possession was fatally erroneous, being contrary to due process and in conflict with pertinent instructions required in other federal circuits, for failure to clarify that proof of possession merely permits, but does not require, a finding of knowledge of illegal importation.

A. There is no proof of actual or constructive possession by petitioner nor proof of knowledge of illegal importation which can only stem from proof of possession.

An essential element of the offenses charged under 21 U.S.C. 174 is *knowledge by defendant* that the narcotics were illegally imported. There was no proof of this essential element.

Proof of knowledge of illegal importation of drugs can be presented in either of two ways. The government can introduce affirmative evidence proving such knowledge, as, for example, in a case where a defendant is proven to have himself transported drugs across an international border. Or, the government may rely solely on the statutory presumption legislatively created in Sec. 174. By means of this presumption, the ultimate fact—a defendant's knowledge of illegal importation of drugs—may be presumed upon proof of the fact that he possessed the drugs.

Since there was no direct or circumstantial proof of Guido's actual knowledge of illegal importation, the gov-

ernment relied on the statutory presumption to establish this essential element of the offense. The evidence failed to establish that Guido was ever in possession of any narcotics; therefore the statutory presumption could not be utilized.

The Court of Appeals disposed of petitioner's well-documented argument in this regard merely by citation of *United States* v. *Holmes*, 452 F.2d 249, 258 (7 Cir. 1971), for the proposition that the statutory presumption should apply to the supervisor as well as to the delivery man. (App. A, p. 9) But the difficulty here is that the government has not proved Guido to have been anybody's supervisor. (See Point 1, *supra*).

While the "possession" requisite to bring into play the statutory presumption of Sec. 174 need not be actual or exclusive, and may be constructive or joint, it must be such as to permit the finder of fact to conclude that the defendant actually had the power to exercise dominion and control over the drugs; otherwise the presumption cannot be invoked. *Hernandez* v. *United States*, 300 F.2d 114, 117 (9 Cir. 1962); *Rodella* v. *United States*, 286 F.2d 306 (9 Cir. 1960), *cert. denied*, 365 U.S. 889; *United States* v. *Landry*, 257 F.2d 425, 431 (7 Cir. 1958); *United States* v. *Steward*, 451 F.2d 1203, 1207 (2 Cir. 1971); *United States* v. *Hysohoin*, 448 F.2d 343, 348 (2 Cir. 1971).

In reversing a conviction under Sec. 174, the Seventh Circuit has stated:

> "[N]o court . . . has held that proof of possession by one person may be established by circumstantial evidence when the undisputed direct proof places that possession in some other person." *United States* v. *Landry*, 257 F.2d 425, 431 (7 Cir. 1958)

> "The provision which raises a presumption of guilt from the fact of unexplained possession, and thereby shifts the burden of proof to a defendant, is drastic, no doubt designed to meet a menacing situation. Congress has created a presumption upon proof of the existence of a fact, and now the government would have the court presume the fact [of possession by the defendant.] . . . In our judgment the record is devoid of proof that Landry had possession. It follows that there is no basis for a conviction on counts 7 and 8." *Id.* at 432.

We urge the court to consider in its entirety a decision in conflict with the case at bar, *Hernandez* v. *United States,* 300 F.2d 114 (9 Cir. 1962). Summarizing this decision in a later case, *United States* v. *Estrada,* 441 F.2d 873 (9 Cir. 1971), the appeals court restated its basic principle thus:

> "In *Hernandez,* we held that a co-conspirator's possession of heroin could not be imputed to his co-defendant. In order to activate the [statutory] inference of knowledge of illegal importation arising from possession the Government must prove that each conspirator actually or constructively possessed the narcotics . . ." *Id.* at 879.

Succinctly controlling the facts here, *Hernandez* stated, 300 F.2d at 122:

> "Engrafting the doctrines of vicarious liability taken from the general law of conspiracy upon the presumption of guilt in this highly penal statute would extend the statutory presumption over so wide and uncertain an area of conduct, and with such severe consequences to the actors, that it is a step not to be taken by a court without clear congressional direction."

As to the application of this doctrine since its pronouncement, see the following cases, which reversed: *United States* v. *Febre,* 425 F.2d 107, 111-12 (2 Cir. 1970); *United States* v. *Jones,* 308 F.2d 26, 30-31 (2 Cir. 1962); *Arel-*

lanes v. *United States,* 302 F.2d 603, 606 (9 Cir. 1962); *Brumbelow* v. *United States,* 323 F.2d 703 (10 Cir. 1963); *Williams* v. *United States,* 418 F.2d 159, 162-63 (9 Cir. 1969); *Mason* v. *United States,* 383 F.2d 107, 109-10 (10 Cir. 1967); *Jefferson* v. *United States,* 340 F.2d 193, 197-99 (9 Cir. 1965); *Hill* v. *United States,* 379 F.2d 811 (9 Cir. 1967).

See also *Pratti* v. *United States,* 389 F.2d 660, 662 (9 Cir. 1968), following *Hill* and *Hernandez, supra.*

A recent Second Circuit case adopting the *Hernandez* doctrine, *United States* v. *Hysohion,* 448 F.2d 343 (2 Cir. 1971), is directly in point. We urge the Court to consider this entire case, especially at pp. 347-48, because of its clear pertinence to the case at bar.

All of the above authorities are in conflict with the decision by the Seventh Circuit.

In *United States* v. *Steward,* 451 F.2d 1203 (2 Cir. 1971), two defendants, Sands and Steward, were convicted of various substantive offenses and conspiracy arising out of the transportation and sale of heroin. While affirming the convictions as to Steward, the court reversed all convictions as to Sands, holding:

> "While we have found the evidence was sufficient to sustain the conviction of Steward, we find it inadequate in the case of Sands. The government argues that the evidence was sufficient to establish that Sands had possession of the heroin, or alternatively, that such proof is not necessary where the aider and abettor or conspirator knows that a principal (Steward) had possession and where he was an active participant in the planned transaction. . . . The government cannot attribute Steward's possession to Sands and thereby establish the latter's knowledge of illegal importation

—a necessary element of his conviction as a principal, conspirator or aider and abetter. . . .

"We cannot agree with the argument that Sands' possession of the heroin can be inferred from the fact that he was the armed chauffeur of the car which brought Steward to the motel. Looking at the facts in the light most favorable to the government, there is nothing to establish that Sands exercised any dominion or control over the drugs." *Id.* at 1206-07.

Based on the aforestated principles, with particular emphasis on *Hernandez, Hysohion* and *Steward, supra,* we respectfully urge the Court that permitting reliance on the statutory inference in the light of the record in this case was manifestly incorrect. Absent the evidentiary use of the presumption, there was no evidence of an essential element of the offense, namely, that defendant knew the narcotics had ben illegally imported.[10]

The Court of Appeals disposed of such argument without any discussion of any of the foregoing authorities; and its exclusive reliance upon *United States* v. *Holmes,* 452 F.2d 249 (7 Cir. 1971), is utterly misplaced. (See App. A, p. 9).

The court's decision constitutes a conflict with the authorities heretofore cited from other Circuits. Under the

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[10] The comments by the Second Circuit Court of Appeals are apt here as to the difficulties facing the government in establishing sufficient proof to justify conviction. In *United States* v. *Jones,* 308 F.2d 26 (2 Cir. 1962) the court had this to say:

"The Government's final contention is that all that is required to convict one of having violated 21 U.S.C.A. § 174 is proof that he participated in a transaction with knowledge that the commodity involved therein was a narcotic.

"The violence this contention does to the language of the statute that explicitly requires that the violator have knowledge of the illegal importation of the narcotic, not merely a knowledge that the commodity is a narcotic, is sufficient to force a rejection of the contention." *Id.* at 33.

existing conflicting law among the circuits, a defendant's guilt or innocence may hinge upon the geography of his trial and appeal; under our federal system of uniform substantive criminal law, such divergent results must not be condoned. Certiorari should be allowed to clarify the applicability of a statutory presumption based upon possession to an alleged conspiracy or aider and abettor situation in order to resolve this irreconcilable conflict.

For failure of proof of petitioner's knowledge of unlawful importation, which under the evidence here could stem only from proof of possession—absent here—the convictions should be reversed.

B. The court's instruction to the jury concerning the presumption arising from possession was fatally erroneous for failure to clarify that proof of possession merely permits, but does not require, a finding of knowledge of illegal importation.

With respect to the conspiracy instructions (Tr. 1099-1104), the whole issue was thoroughly obfuscated, as witness the request by the jury for further instructions in connection with conspiracy (A. 49; see Point 4, *supra.*)

With respect to counts 6, 7, 10 and 11, the instruction removing from the government the necessity for proving knowledge of importation [11] on the part of the defendant

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[11] The court's instruction as to knowledge of illegal information is as follows:

> "Knowledge of the illegal importation of the narcotic drug is an essential element of the crime. However, where the evidence establishes beyond a reasonable doubt that the defendant Guido had possession of the narcotic, actual or constructive, as defined in these instructions, it is not necessary to prove that the narcotic was unlawfully imported. Under the law, defendant's possession shall be deemed sufficient to authorize conviction, unless such possession is explained to the satisfaction of the jury." (A. 48).

violated defendant's constitutional right to a proper trial in accordance with due process of law. Such due process requires the government to prove all essential elements of the crime, one of which is, according to the statute in question, proof that defendant had knowledge of the illegal importation. The lead case on the subject is *United States* v. *Peeples,* 377 F.2d 205 (2 Cir. 1967).

There the court instructed the jury as follows:

> "*** the second element with respect to each sale is that the government must satisfy you beyond a reasonable doubt that the defendant knew that the heroin which was the subject matter of this sale had been illegally imported.
>
> "But now with regard to this second element, the importation, the law provides that if you find the defendant had possession of the heroin, than you may, but you are not required to, you may infer that the defendant knew that the heroin was imported contrary to law, unless on all of the evidence you can prove that the defendant had explained his possession of the heroin to you to your satisfaction, and this refers, ladies and gentlemen, to *lawful possession,* to your satisfaction.
>
> "So here you will consider whether on all the evidence, including the defendant's testimony, the defendant has satisfactorily explained to you his possession of heroin and that he did [not] know of the illegal importation." (Emphasis supplied.) *Id.* at 208.

The court reversed, stating:

> "There was serious and prejudicial error in the instructions given by the court below. The initial charge, quoted supra, is deficient in its failure to advise the jury that, despite the operation of the statutory presumption, Peeples would not have violated the statute

> by his having had *unlawful* possession of the heroin if he had no knowledge of its unlawful importation. Within the meaning of Section 174, an accused need not show 'lawful' possession to merit a 'not guilty' verdict; if believed by the jury, evidence disclaiming his knowledge of unlawful importation is sufficient." (citing cases) *Id.* at 209.

In *United States* v. *Christion,* 426 F.2d 787 (9 Cir. 1970), the Court reversed for failure of the trial court to instruct the jury in accordance with *United States* v. *Peeples, supra.* The Court stated that "there was no clear instruction that defendants were to be acquitted unless, upon all the evidence including proof of possession, the jury was satisfied beyond a reasonable doubt that the heroin was unlawfully imported and defendants had knowledge of that fact." *Id.* at 789. Despite the statutory presumption, the Court held that:

> "Even if the defendants' possession of narcotic drugs is unlawful, the jury is to acquit if there is reasonable doubt either that the drugs were imported contrary to law or that defendant knew they were unlawfully imported." *Id.* at 788.

The *Christion* Court relied upon the following cases: *United States* v. *Peeples,* 377 F.2d 205, 209 (2 Cir. 1967); *United States* v. *Llanes,* 374 F.2d 712, 715-16 (2 Cir. 1967); *Chavez* v. *United States,* 343 F.2d 85, 88-90 (9 Cir. 1965); *Griego* v. *United States,* 298 F.2d 845, 848-49 (10 Cir. 1962); and *Verdugo* v. *United States,* 402 F.2d 599, 601, 603 n.3 (9 Cir. 1968).

Another case reversing because a requested *Peeples* instruction was refused is *United States* v. *Birmingham,* 447 F.2d 1313 (10 Cir. 1971). The Court held:

> "As possession creates only a presumption which may be rebutted, the jury should be carefully instruct-

> ed as to the consideration it should give this evidence. The jury may, based on the proof of defendant's possession of narcotics, infer a knowledge of their illegal importation. The jury is *permitted,* but is *not required,* to draw an inference based on its finding beyond a reasonable doubt that the accused had possession of the heroin, unless explained to its satisfaction by the evidence in the case, and find the heroin to have been imported into the United States contrary to law, and to further infer that the accused had knowledge of such illegal importation." *Id.* at 1316-17. (Emphasis ours.)

Note that the Court in *Birmingham* stressed that the statutory presumption *permits,* but does *not require,* the jury to infer illegal importation and defendant's knowledge thereof from proof of the fact of his possession of the drug.

Certiorari should be allowed so that this Court may definitively decide what instruction may properly be given concerning such a statutory presumption; we submit that the one given here does violence to settled case law from other Circuits and to due process as well.

3.

Petitioner's rights under the Sixth Amendment and the Jencks Act were violated by failure of a government agent, who testified against petitioner at trial, to make any notes of his alleged observations, and by the destruction of notes by another such agent, which effectively precluded petitioner from meaningful cross-examination.

In *United States* v. *Missler,* 414 F.2d 1243 (4 Cir. 1969), the court commented upon the practice of FBI agents' destroying their notes made contemporaneously with the events observed and cited *United States* v. *Johnson,* 337 F.2d 180 (4 Cir. 1964):

> "Each time the problem has arisen even the FBI has claimed that the notes were destroyed as part of FBI routine. This is really not a satisfactory answer . . . One of the purposes of both the *Jencks* decision and the Jencks Act is to afford the defense an opportunity to impeach witnesses . . . [citing cases]. The destruction of interview notes does not advance this purpose . . . Eliminating uncertainty may serve the interests of the Government no less than the defendant." *Id.* at 202-03.

In the case at bar, no notes were made by agent Thompson; and he never told anybody from the time of his observations on January 20, 1971 to the date of trial (thirteen months later) what he heard and saw at Turzitto's tavern. He did not even tell any other agent of the events of his observations. (Tr. 41) But Thompson testified he refreshed himself before his testimony with reading a report prepared by agent McNamara of the events on January 20, 1971. (A. 40) There was not a word in McNamara's report from beginning to end reflecting what agent Thompson was supposed to have overheard (A. 40), and although Thompson stated such an omission was an "accidental" omission, he never told anybody what he overheard. There was no reason why he did not tell any other person, any other agent, or any United States Attorney what he had overheard until his testimony thirteen months after the supposed events. (A. 41)

Moreover, agent Koepp, who testified to his observations at the same time and place, admittedly destroyed his notes after relating their contents to agent McNamara; yet McNamara's reports did not even mention Koepp as being at the scene. (A. 35-36)

The appeals court ruled against petitioner without explanation. (App. A, p. 9)

As to the manner of preparing false 3500 reports (or even falsifying where no report is made) see *United States* v. *Meele*, 462 F.2d 918 (2 Cir. 1972). In *Meele*, a narcotics conviction was reversed because, "In this case it is clear from the very inception that the prosecution labored to keep vital information from the defense, the trial judge and the jury. In addition, some official narcotic agents' reports slanted information was inserted and produced to the defense, the judge and the jury in order to even shroud the Government's initial deceit." *Id.* at 924.

And see *United States* v. *Aaron*, 457 F.2d 867 (2 Cir. 1972) where the withholding of a 3500 report caused defense counsel to cross-examine in a certain manner, laying a predicate for impeachment; but then another report was furnished to defense counsel, causing his client to be prejudiced before the jury.

Although Thompson's failure to make any report of his observations, and his testimony that he told not a soul from January 20, 1971 to February 18, 1972 when he testified, (A. 40-41) may be interpreted as going to the weight of his testimony and not to its admissibility, we submit that deliberate failure to prepare notes and preserve them in the form of reports, frustrates a defendant in his right to cross examine and possibly impeach. *Cf. Missler, supra*, at 1303. So too with Koepp's destroyed notes, where McNamara's report does not corroborate even that Koepp was present.

It is too late in the day to question the fundamental principle that the right to meaningful cross-examination is encompassed by the Sixth Amendment right of confrontation. *Alford* v. *United States*, 282 U.S. 687.

Certiorari should be granted to consider the Sixth Amendment's requirements vis-a-vis the Jencks Act, 18 U.S.C. 3500. It appears that this Court has never had occasion to decide this question in a case where, as here, agents both failed to take notes and destroyed notes. And for this violation of his statutory and constitutional rights in an area going to the very heart of the fact-finding process, petitioner's convictions ought to be reversed.

4.

The trial court committed reversible error by precluding the jury, in advance, from the opportunity to inquire about portions of the evidence about which it may have needed its recollection refreshed, particularly in view of the voluminous testimony and evidence of record and the paucity of competent evidence against petitioner. Moreover, such spontaneous instruction by the court constituted an abdication of the responsibility to exercise judicial discretion.

Before it sent the jury to deliberate on the verdicts, the court charged the jury:

> "I might mention that occasionally juries ask if they can see a transcript of testimony because of the court reporter's presence. That I can answer for you in advance. It is not permitted. But if you have any other problems which require a response by the court you can submit them in writing through the U.S. Marshal." (A. 49).

Acknowledging that giving this instruction was error, the reviewing court without discussion or explanation held the error not to be reversible. (App. A, p. 9) Such decision was manifestly incorrect.

The trial was a long one, having started on February 14 and ended on February 22, 1972. Each of the government's witnesses was cross-examined at great length; and many of the government's witnesses testified to considerable detail as to the Carioscias. But Guido's name was brought in only in connection with the October 14, 1970 and January 20, 1971 transactions. (See App. D, *infra.*)

It was error to preclude the jury from requesting that it be refreshed as to the testimony of one or more of the witnesses. As the court stated in reversing the conviction in another narcotic case, *United States* v. *Fiorito,* 300 F.2d 424 (7 Cir. 1962):

> "And if the jury forgot a material answer given by a witness there are circumstances in which the defendants, as a matter of right, would be entitled to have the jury informed as to the testimony of the witness. *United States* v. *Jackson,* 3 Cir. 257 F.2d 41, 43." *Id.* at 426-27.

It should be noted that in *Fiorito,* the trial court also precluded the jury from asking questions about evidence.

In the *Jackson* case, cited in *Fiorito,* the Third Circuit also reversed a narcotic conviction where, during deliberations, the jury made an inquiry about the identity of one of the witnesses, as to whether or not such witness was a government employee. The question was not answered by the court, and the Court of Appeals reversed, stating:

> "The point of the jury's question was highly relevant. The court just explained what entrapment was and on the matter of entrapment the question of whether 'Sarge' was a government employee was certainly something to be considered. In view of the circumstances present in this case, we think that the fail-

ure to permit the reading of the relevant testimony at a time when it would have been useful in the jury's deliberations created unfairness to the defendant.

"That the jury may be given information upon what a witness has said if it is possible to furnish it is well settled." 257 F.2d at 43.

While re-reading of evidence after the jury retires lies almost exclusively within the good judgment of the trial court, *United States* v. *DePalma*, 414 F.2d 394 (9 Cir. 1969), even that case recognizes that, in each instance where the jury may request evidence to be re-read, "It is within his [the trial judge's] discretion to determine if the jury's request should be granted or denied." *Id.* at 396.

The only reasonable conclusion to be reached from this position of the reviewing court is, that if the jury in a particular case in fact requests to have certain evidence read after deliberations have begun, the trial judge must exercise his good judgment and discretion as to whether or not to allow such request in the context of the case in question. To issue instead, as in the case at bar, a blanket denial in advance of any such request, constitutes an abdication, not an exercise, of the court's responsibility in this regard. Such premature decision, not based on the facts and circumstances of a specific request, amounts to an abuse of discretion, for, in fact, no discretion has been exercised in such a situation. *Cf. United States* v. *Daniels*, 446 F.2d 967 (6 Cir. 1971), to the effect that, while the sentencing decision is clearly within the trial court's discretion, still such decision will be reversed on review where it is evident that his discretion was not exercised at all.

Upholding the trial court's refusal to grant the jury's request in *DePalma, supra,* the court noted, "Here the

judge acted and explained his reasons for so acting [upon a particular jury request.]" 414 F.2d at 396. In the case at bar, however, the court did *not* act; he flatly denied any and all anticipated requests before any were made.

Although the court in *United States* v. *Schor,* 418 F.2d 26 (2 Cir. 1969), noted a preference for having requested portions of the evidence read to the jury rather than sending a written transcript of such testimony to the jury room, still the latter procedure, even in that case, was not held erroneous. Indeed, the court recognized that either procedure—oral or written—is legally permissible. *Id.* at 31.

In *United States* v. *Rabb,* 453 F.2d 1012, 1014-15 (3 Cir. 1971), the court reversed because the trial court had improperly refused to grant the jury's request to have certain testimony read to them after they had retired to deliberate, relying squarely on *United States* v. *Jackson,* 257 F.2d 41 (3 Cir. 1958).

The court, in *Rabb,* 453 F.2d at 1015, also relied upon the ABA's Standards Relating to Trial by Jury (ABA Project on Minimum Standards of Criminal Justice), Sec. 5.2 (Approved Draft 1968), as follows:

> "Jury request to review evidence.
>
> (a) If the jury, after retiring for deliberation, requests a review of certain testimony or other evidence, they shall be conducted to the courtroom. Whenever the jury's request is reasonable, the court, after notice to the prosecutor and counsel for the defense, shall have the requested parts of the testimony read to the jury and shall permit the jury to reexamine the requested materials admitted into evidence."

Amid the morass of conflicting evidence and complicated rules of law, the jury should not have been discouraged

from asking for clarification of the evidence. Yet this was the natural and probable consequence of the court's statement.

Of course, we will never know what questions about the evidence might have come to the minds of the jury. As they were foreclosed from asking the court about the *evidence* in the case, they did ask about the law involved as to how to treat the commencement of the alleged conspiracy. The jury sent out a written message asking whether it should construe the conspiracy count to have begun on October 14, 1970 as opposed to August 1, 1970 as stated in the indictment. (A. 49) Although the court advised the jury in the affirmative, it had previously allowed the jury to consider all acts and declarations of the Carioscias in August and in September of 1970, and, over objections, the court permitted the jury to consider the narcotics which were sold to Harris by the Carioscias in August and September, 1970. How could the jury properly sift the evidence?

As the court itself said, there was "tenuous" connection of Guido to certain events (A. 42). Maybe the jury would have wanted being refreshed as to the paucity of evidence on certain points. Accordingly, it was error to cut off *in limine* the possible request by the jurors for some part of the testimony to be read to them.

Apparently this Court has never ruled on the instant issue. Certiorari should be granted, and this court should declare the impermissibility of such abdication of judicial responsibility. Considering the posture of the evidence, the error was prejudicial to petitioner.

5.

The trial court's denial of petitioner's motion for new trial based on newly discovered evidence constituted an abuse of discretion, where the newly discovered evidence conclusively established the falsity of certain government evidence, and subsequently was taken as true by the trial court in the bench trial of petitioner's co-indictee wherein said co-indictee was acquitted. Under these circumstances, petitioner's convictions may not be permitted to stand consistent with due process of law.

After conviction on February 22, 1972, petitioner filed his motion for new trial based on newly discovered evidence. The motion and supporting affidavits demonstrated that co-defendant Rudolph Piemonte was in Acapulco, Mexico on January 19 and 20, 1971 and therefore could not have been in Chicago on those dates. (R. 30).

At the time the court denied the motion for a new trial, petitioner had not yet proven his assertions that Piemonte was in Mexico on January 19 and 20, 1971 and therefore could not have been seen by agents Chown and Young who stated they saw him on those dates.

Subsequently, and before decision by the appeals court, the trial court held, in finding Piemonte not guilty, that he had a reasonable doubt as to whether Piemonte was in the country on the date in question.[12] (App. C, p. 11)

The trial court ruled the petitioner made a "sufficient showing of newly discovered evidence. . . ." (Tr. 5/19/72,

[12] Judge McMillen's order in Piemonte was of record in the Court of Appeals, and this issue was additionally briefed in Guido's Supplemental Brief filed therein after such order was entered.

p. 13-14) and was inclined to grant a new trial (p. 37) as to Counts 10 and 11 only. (Tr. 37-38) (Those counts related to January 19 and 20, 1971.)

However, the court changed its prospective ruling and denied the motion for new trial on June 19, 1972. (R. 34, 36). The Court of Appeals found no error, again with absolutely no discussion, citation of authority, or justification for its decision. (App. A, p. 9)

Agents Chown (A. 34) and Young (A. 23) testified they saw Piemonte talking with petitioner and the Carioscias on January 19, 1971. If petitioner had had proof of Piemonte's whereabouts on that date, defense counsel could have impeached the agent-witnesses, thus casting doubt upon their credibility as to other observations as well.

The case against petitioner was both wholly circumstantial and highly tenuous. Thus each item of surveillance evidence presented by the government must be viewed as a piece of the whole cloth. If any thread of it be discredited in the mind of the jury, the jury might well have concluded that other government evidence was similarly lacking; in any event, the jury might have found a reasonable doubt as to defendant's guilt and acquitted him if they were convinced that any government agent testified falsely or mistakenly in any significant particular.

In his motion, petitioner set forth that Rudolph Piemonte's whereabouts were unknown to him until after petitioner's trial.

Fundamental fairness demands that a new trial be ordered at which the jury should be permitted to consider that Rudolph Piemonte was out of the country at a time

when government witnesses testified he was seen with defendant in Chicago.

Although generally a motion for new trial will not be granted where the newly discovered evidence is "merely cumulative or impeaching," *Mesarosh* v. *United States,* 352 U.S. 1; *United States* v. *McWilliams,* 421 F.2d 1083, 1084-85 (8 Cir. 1970), *cert. denied,* 397 U.S. 1070; *United States* v. *Rutkin,* 208 F.2d 647, 649 (3 Cir. 1963), the test must be viewed, not in the abstract, but as it has actually been applied by the courts.

As applied in the better-reasoned decisions, the test is: If the evidence is newly discovered, a new trial should be allowed if it is likely that a jury hearing such evidence might have a reasonable doubt as to defendant's guilt, even if the thrust of the newly discovered evidence is impeaching in character.

In *Mesarosh* v. *United States,* 352 U.S. 1, this Court ordered a new trial where the credibility of one government witness (of a total of seven who had testified against defendant) was wholly discredited by subsequent events involving his having perjured himself at subsequent trials. The outcome would very likely be affected had the jury known how lacking in credibility this witness was; hence, a new trial was in order, even though the newly discovered evidence went only to credibility.

Many cases recognize that newly discovered impeaching evidence may properly form the basis for granting a motion for new trial, if the evidence is such that a jury *might* have a reasonable doubt of defendant's guilt upon consideration of the newly discovered evidence.

In a case, where the newly discovered evidence was "merely impeaching," the court held that a motion for new trial should have been granted. *Ingram* v. *Peyton,* 367 F.2d 933, 936-37 (4 Cir. 1966). The Court held:

> "After-discovered evidence, which is merely impeaching, cumulative or corroborating will not ordinarily invalidate a verdict, but if such evidence is of a character to raise a substantial likelihood that it would have affected the result if known at the trial, its nondisclosure cannot be ignored."

Other cases granting a new trial, even though the newly discovered evidence was of an impeaching nature, include: *United States* v. *Miller,* 411 F.2d 825, 831-32 (2 Cir. 1969) (test is whether the newly discovered impeaching evidence could have induced in the jury a reasonable doubt to avoid conviction); *Coates* v. *United States,* 174 F.2d 959, 960 (D.C. Cir. 1949) (test is whether newly discovered impeaching evidence might very well have raised a reasonable doubt with the jury as to defendant's guilt); *United States* v. *Gordon,* 246 F. Supp. 522 (D. D.C. 1965); *Hawkins* v. *United States,* 324 F.2d 873 (5 Cir. 1963); *Arbuckle* v. *United States,* 146 F.2d 657, 659-60 (D.C. Cir. 1944).

It is important to remember that the test is not whether the judge believes that the newly discovered evidence would raise in his own mind a doubt as to defendant's guilt.

> "[I]t is not the function of a trial judge to decide finally what the verdict should be, but simply to determine whether the newly discovered evidence should be submitted to a new jury. So, if the trial judge feels that the newly discovered evidence might well result in a different verdict . . . it is his duty 'in the interest of justice' to grant a new trial." *United States* v. *Mitchell,* 29 F.R.D. 157, 159 (D.N.J. 1962) (New trial granted.)

In *Mejia* v. *United States*, 291 F.2d 198, 200-01 (9 Cir. 1961), defendant had made certain admissions, but at trial claimed he had done so falsely in order to look like a "big-shot." He gave alibi testimony, and was convicted. Subsequently defendant moved for a new trial, claiming the new discovery of a disinterested witness to corroborate his alibi. The trial court denied the motion, saying the jury could not possibly reach a different verdict in view of defendant's admissions. The appellate court reversed, stating, "[it is] too dogmatic to say that the jury could not . . . regard the . . . [newly discovered evidence] as sufficient to raise a reasonable doubt notwithstanding the admissions made by the appellant." *Id.* at 201.

Moreover, a slightly different test prevails where, as here, the newly discovered evidence is of such nature that, if believed, it established that government witnesses have testified either falsely or mistakenly, through inadvertence. This rule was formulated by the Seventh Circuit in *Larrison* v. *United States*, 24 F.2d 82, 87-88 (7 Cir. 1928), which held that a new trial should be granted if:

> "(a) The court is reasonably well satisfied that the testimony is false;
>
> (b) That without it the jury might have reached a different conclusion;
>
> (c) The party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it . . . until after the trial." *Id.* at 87-88.

In addition to the foregoing authorities, we further submit for consideration the following cases:

Motions for new trial based on newly discovered evidence granted by district court: *United States* v. *Miller*, 61 F.Supp. 919 (D.C.N.Y. 1945); *United States* v. *Segelman*, 83 F.Supp. 890 (D.C. Pa. 1949).

Motions for new trial based on newly discovered evidence had been denied by district court; appellate court reversed and remanded for full hearing on merits of defendant's motion:

United States v. *Stewart*, 445 F.2d 897 (8 Cir. 1971);

Jackson v. *United States*, 371 F.2d 960 (D.C. Cir. 1966);

Hamilton v. *United States*, 140 F.2d 679 (D.C. Cir. 1944);

Harrison v. *United States*, 7 F.2d 259, 262 (2 Cir. 1925);

Rubenstein v. *United States*, 277 F.2d 638, 642-43 (10 Cir. 1955);

DeBinder v. *United States*, 303 F.2d 203 (D.C. Cir. 1962);

Casias v. *United States*, 337 F.2d 354 (10 Cir. 1964);

Richardson v. *United States*, 360 F.2d 366 (5 Cir. 1966); after remand, district court denied motion after full hearing on the merits; *aff'd after remand*, 376 F.2d 845 (5 Cir. 1967);

Brodie v. *United States*, 295 F.2d 157 (D.C. Cir. 1961).

Motions for new trial based on newly discovered evidence had been denied by district court; appellate court reversed with directions to grant a new trial:

United States v. *Chisum*, 436 F.2d 645 (9 Cir. 1971);

Blocker v. *United States*, 274 F.2d 572 (D.C. Cir. 1959);

Griffin v. *United States,* 183 F.2d 990 (D.C. Cir. 1950);

Delbridge v. *United States,* 262 F.2d 710 (D.C. Cir. 1968);

Amos v. *United States,* 218 F.2d 44 (D.C. Cir. 1954);

Nagell v. *United States,* 354 F.2d 441 (5 Cir. 1966); conviction after new trial; *rev'd and remanded* with directions to acquit, 392 F.2d 934 (5 Cir. 1968);

Newsom v. *United States,* 311 F.2d 74, 78-79 (5 Cir. 1962); conviction after new trial; rev'd for insufficient evidence, 335 F.2d 237 (5 Cir. 1964).

In sum, we submit that a new trial should be granted in the interest of justice. It is important to remember that the witnesses impeached by the newly discovered evidence are government agents. If the jury be convinced that they gave false or mistaken testimony, how can the court conclude otherwise than that the jury would begin to doubt other portions of the government's circumstantial case in which defendant's guilt was certainly not overwhelmingly proven; or that in any event, that the jury, had they had the newly discovered evidence before them at trial, might not have found a reasonable doubt as to defendant's guilt and acquitted him?

Certiorari should be granted to consider these issues, particularly since the trial court subsequently itself accepted the truth of the new evidence. At the very least, petitioner should be afforded a new trial.

6.

The Appellate Court's issuance of its "order", deciding matters of substantive constitutional import summarily in favor of the government and against petitioner, without discussion of petitioner's properly raised arguments and authorities, deprived petitioner of meaningful appellate review, in violation of his Fifth Amendment due process rights. Certiorari should be allowed to review the present "order" decisional system being employed by court rule in the Seventh Circuit to determine whether such rule, as applied by the court, undermines and violates the right to meaning appellate review of federal constitutional claims.

A direct appeal from a United States District Court to a Court of Appeals is a matter of right, fundamental to due process of law. *Coppedge* v. *United States,* 369 U.S. 438, 441; *Arrastia* v. *United States,* 455 F.2d 736 (9 Cir. 1972). We submit that the presently utilized procedures of the Court of Appeals for the Seventh Circuit effectively thwart the exercise of such right.

Ostensibly following the provisions of Rule 28 of the Rules of the Court of Appeals for the Seventh Circuit,[13] the court decided petitioner's case by way of an unpublished "order" rather than a published opinion. Under Rule 28, cases disposed of by "order" need not contain discussion of reasons for the rulings. The determination whether to decide a case by order or by opinion is left to the panel deciding the case, based upon guidelines contained in the Rule. Under these guidelines, orders rather than

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[13] The Rule is fully set forth at p. 4, *supra.*

opinions are permitted *inter alia* in cases where no questions of general import are raised; moreover, orders may be cited as legal authority within the Circuit, either by parties or by courts.

As applied to petitioner, utilization of this Rule and disposition of his case by a written order constitutes a mockery of the appellate process. Moreover, and perhaps more importantly to the greater considerations of the administration of justice, such disposition of an appellant's case at the unbridled discretion of the deciding appellate judges effectively precludes other prospective defendants and appellants from even knowing of such a decision's existence, and actually precludes them from relying on such decision. When obviously important issues of constitutional dimension, not nearly so clear-cut against petitioner as the court of appeals "order" would lead one to believe, may be decided out of hand with a simple, "we find no merit in appellant's position," it becomes apparent that Rule 28 is not being implemented in accordance with its salutary stated purposes.

The only issue treated in any depth by the reviewing court is petitioner's contention that the evidence was insufficient. However, while petitioner's argument on this point occupied some 14 pages of his original brief, and cited numerous authorities, the reviewing court's only case citation directed to this issue was *Glasser* v. *United States,* 315 U.S. 60, for the proposition that on appeal, the court must construe the evidence most favorable to the government. (App. A, p. 4) No attempt was made to distinguish the relevant cases dictating reversal (as also set forth herein; see Points 1 and 2, *supra*).

The only case aside from *Glasser* which the court mentioned was *United States* v. *Holmes*, 452 F.2d 249 (7 Cir. 1971), cited without discussion as support for the trial court's having given the instruction concerning the statutory presumption. (App. A, p. 9) (As previously noted that cited case was factually inapposite to the case at bar. See Point 2, *supra*.) And the court's "reasoning" on the judge-jury inconsistency is specious. (See Point 1C, *supra*.)

As to petitioner's other contentions, they received the following short shrift:

> "We find no error in the denial of the motion for a new trial on the ground of newly discovered evidence, or in the claimed violation of the Jencks Act. Finally, although the court's comments that the jury could not see the transcript may have implied, improperly, that the jury could not make any inquiry of the court during these deliberations, that comment certainly was not reversible error." (App. A, p. 9)

Based upon the arguments raised and documented in the foregoing portions of this Petition, all of which were fully briefed and argued below, it is clear that the appellate court's decision by its "order" does not fully or fairly dispose of petitioner's contentions, none of which may be deemed frivolous, all of which are substantial, some of which are of first impression, and all of which raise questions of substantive constitutional law. Such disposition of his appeal amounts to an abuse of appellate discretion, and this Court should act in the exercise of its supervisory power over the federal courts to remedy the situation.

This Court recently has spoken to the necessity of prisoners' meaningful access to the courts, holding that deprivation of same constitutes a violation of their civil rights,

and condemning the discouragement of legal recourse by various prison methods. *Johnson* v. *Avery*, 393 U.S. 483.

Certiorari should be allowed to review the claim that petitioner has not been afforded an effective appellate review.

Conclusion

For any of the foregoing reasons this Petition for the Writ of Certiorari should be granted.

JULIUS LUCIUS ECHELES
Attorney for Petitioner

October 3, 1973.

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued April 6, 1973
July 16, 1973

Before
Hon. THOMAS E. FAIRCHILD, *Circuit Judge*
Hon. JOHN PAUL STEVENS, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 72-1782 *vs.*

LOUIS GUIDO,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 71 CR 221
THOMAS R. MCMILLEN, *Judge.*

ORDER

The principal question raised by the appeal is whether the evidence was sufficient to support the jury's verdict finding appellant Guido guilty of conspiracy and direct

participation in two heroin transactions, one on October 14, 1970, and the other on January 20, 1971. To answer that question it is necessary to review the facts in some detail.

The indictment resulted from a series of six substantial purchases made by the government informer (Harris) with funds supplied by the government. During the transactions Harris was under almost constant surveillance by several government agents, his telephone conversations were monitored, and some of his direct conversations were overheard by means of a "kel" radio transmitter. In each instance Harris received the heroin from, and paid the purchase price to, Frank Carioscia; his negotiations were either with Frank or his brother, Michael Carioscia. Frank and Michael pleaded guilty to all twelve counts of the indictment. Their participation is not disputed.

Nor is there any dispute about the character, quantity, or value of the heroin. On August 19, 1970, approximately six ounces (185.3 grams) were sold for $6,000; on September 2, 1970, approximately ten ounces (310.2 grams) were sold for $10,000; on October 14, 1970, over eight ounces (254.2 grams) were sold for $8,000; on December 14, 1970, about six ounces (178.53 grams) were sold for $6,000; on January 20, 1971, about 34 ounces (1,066.66 grams) were sold for $32,000; and, on February 23, 1971, Frank and Michael were arrested as they prepared to make delivery of another kilo (1,073.7 grams) for $32,000. In each instance the heroin was in a clear plastic bag which was concealed in a large container. Thus, on August 19, it was in a black sock wrapped in a towel; on September 2, it was in a black sock with no other wrapping; on October 14, in a brown paper bag; and on December 14, in a "package."

Guido was charged with conspiracy (Count 1) and with direct participation in the October (Counts 6 and 7) and January (Counts 10 and 11) transactions. It was the government's theory that Guido was the "source" of the heroin delivery by Frank Carioscia. Since the finding with respect to October is, in part, dependent on the January evidence, we review the later incident first.

The purchase which Harris made in January was larger than the aggregate of his first four purchases. On January 5, he opened negotiations with Michael for the purchase of a kilo of heroin. Michael stated that he could get "eight or ten ounces right now," but with respect to the request for a kilo, he would "check my source and see." (Tr. 66). The next day Michael offered Harris a kilo for $39,000; when Harris said "that was too much" Michael made a phone call and then said that "his man" would provide 39 ounces for $33,000. (Tr. 67). Harris said he would let him know; a week later Harris again met with Michael stating that Harris's principal would be in town on the 18th and "wanted to set it up for the 18th for the kilo." (Tr. 68). Harris again said the price was too high but that he would let Michael know. On the 18th they had another meeting; Harris said his man would be in that night and that he only had $32,000. Michael said ". . . that was okay . . . And he told me to come by the next day and let him know if the fellow had gone in town with the money and that as soon as his brother comes to relieve him from the bar that he was going to go and meet his source and finalize the deal." (Tr. 70). On January 19 Frank Carioscia visited the apartment building where Guido lived shortly after noon and again later in the afternoon. At about 1:00 o'clock p.m. Michael Cari-

oscia left a meeting with Harris and picked up Guido in his car; Michael and Guido then drove to three or four different locations together.[1]

In the meeting between Michael and Harris, early that afternoon, it was agreed that Harris would meet Frank at the Carioscias' fruit stand at 7:45 that evening to close the transaction. During that meeting Harris asked Michael if he was getting the narcotics "from the same people as before." Michael replied that "he was getting the heroin but he had a different source for the cocaine." (Tr. 72).

When Harris and Frank met on the evening of the 19th, Frank said they would have to wait until the next night because there was "too much heat in the neighborhood." (Tr. 75). The next morning, in a telephone conversation, Michael told Harris that he had already seen Frank and the deal was set for 7:30 that night. (Tr. 77-78). At the appointed hour they met at the fruit stand; and, in exchange for the kilo of heroin, Harris gave Frank $32,000 in bills of various denominations; the money was in a Carson Pirie Scott shopping bag with "CPS" imprinted on its side. Frank took the bag and walked to Guido's residence. He was still carrying the "CPS" bag when he entered the apartment building. Ten minutes later Frank left without the bag. He then walked to his car and drove to Turzitti's Lounge, where he joined Guido. Guido gave him a large roll of bills and asked, "How did it go?" Frank answered, "Okay." After Guido bought a round of drinks, Frank drove Guido to Guido's home.

On appeal we must, of course, construe the evidence most favorable to the government. *Glasser* v. *United States*, 315 U.S. 60. So construed, we believe the jury was

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[1] They went to both the Maulella Drug Store, 1160 W. Taylor, and the Galler Drug Company, 651 South Wells.

entitled to conclude that Guido was the "source" to whom Michael referred in his conversations with Harris. This conclusion is supported by the contacts between the Carioscias and Guido on the afternoon of January 19, which presumably led to the postponement of the closing; by the fact the proceeds of sale were delivered to Guido's residence;[2] and by the post-delivery events in Turzitti's Lounge, where Guido was obviously celebrating the successful conclusion of an important transaction, apparently paid Frank for his services, and received advice that everything had gone "Okay." The conclusion that Guido was Michael's "source" makes his statement in January that the source of his heroin was the "same as before" relevant to the October transaction.

The negotiations for that transaction commenced on Thursday, October 8, 1970. On that day Harris asked Frank if he could get a sample of cocaine. Harris explained that it might be necessary "to sell his friend both heroin and cocaine in order to hold him" (Tr. 37). Frank said "he probably could get it by Tuesday or Wednesday of the next week, but to give him a call Saturday; he might have it before." (Tr. 36). They agreed to use the word "chickens" to refer to cocaine and "tomatoes" to refer

[2] We recognize that the residence was an apartment in a multi-unit building and that it is possible that delivery was made to another tenant in the same building. However, Frank was observed entering the first floor of the building where Guido's apartment was located and in testimony offered by the defense, the fact that Frank actually visited the Guido apartment at that time was confirmed. Considering the evidence as a whole, the jury was certainly entitled to conclude that Frank delivered the "CPS" bag to Guido.

to heroin. The record does not indicate any further contact between Harris and Frank until the following Wednesday. On that day (October 14), however, there was significant activity culminating in the delivery of a brown paper bag containing eight ounces of heroin to Harris.

At 9:00 o'clock that morning Guido walked the short distance from his residence to Del's Restaurant where he was employed. A few minutes later he left with Rudolph Piemonte (who was named as a codefendant in counts relating to the October 14 transactions but not in any other counts); Guido and Piemonte walked to Guido's residence. At 9:20 a.m. they left Guido's residence, with Piemonte holding a brown paper bag in his left hand. Guido pointed to the bag; Piemonte then rolled it up tightly and tucked it inside his jacket under his arm. They separated, Guido returning to Del's Restaurant and Piemonte walking to his car.

Piemonte then circled the block a few times and stopped in front of Del's Restaurant; a man at the door shook his head in a negative way and Piemonte drove away. The man then walked to Guido's residence and, after Piemonte drove by, returned to Del's Restaurant followed by Piemonte. Shortly thereafter Piemonte left the restaurant and was seen with Michael Carioscia.

At 11:45 a.m. Harris telephoned Frank who told him he had no "chickens." Harris said he wanted to meet anyway. They arranged to meet at 1:30 p.m.; at that time Harris told Frank "his man" would be in town that evening with between $6,000 and $10,000 to buy heroin at $1,000 per ounce. He said he would know the exact amount by 8:00 o'clock p.m. Frank instructed Harris to call him at

Turzitti's lounge between 8:00 o'clock and 8:30 p.m. and give him the amount. Frank said he would need two hours to get the package ready and therefore arranged to meet Harris in front of the County Hospital at 10:00 o'clock p.m. to complete the transaction.

Frank returned to the fruit stand which he and Michael ran, and then drove to Del's Restaurant where he conversed briefly with Guido in the doorway. After another trip to the fruit stand, he returned to Del's; his car remained parked in front of Del's until 4:45 p.m. and was then observed across from Guido's residence from 5:00 o'clock to 6:30 p.m. Frank had arrived at Turzitti's Lounge by 7:55 p.m. Harris telephoned Frank at Turzitti's at 8:15, stating that he needed "eight pounds" (eight pounds of tomatoes would equal eight ounces of heroin). At 8:30 Frank left Turzitti's and drove to Del's Restaurant. At 9:30 Piemonte left Guido's residence and went to Del's; at 9:33 Piemonte left Del's; at 9:35 Frank left Del's and drove to the Cook County Hospital where he picked up Harris. The two drove around for about four minutes. During that time Frank delivered a brown paper bag containing eight ounces of heroin to Harris in exchange for $8,000.

After dropping Harris off at the Cook County Hospital, Frank drove to his own residence where he stayed for only a few minutes. When he came out, he drove to a location near Piemonte's residence, double parked, and Piemonte entered Frank's car. They drove around the area for about five minutes. When Frank was next seen he was alone.

Reviewing the day's activities in the light of the fact that the preliminary discussion between Harris and Frank

on October 8 contemplated a sale of "tomatoes" and "chickens" on Tuesday or Wednesday of the following week, we are satisfied that the jury may well have concluded that Guido delivered heroin to Piemonte at 9:05 a.m.; that until 11:45 a.m. Piemonte periodically checked at Del's Restaurant where Guido worked, as well as at Guido's residence, and received negative signs; that after Harris called Frank, he communicated with Michael and Guido who made arrangements to get a package together as soon as they knew the proper amount, and arranged to have Piemonte deliver that package to Frank at Del's Restaurant, which, in turn, Frank delivered to Harris for money which he then transferred to Piemonte. No other reasonable explanation for the rather unusual comings and goings of these associates is apparent.

Guido argues that there is no proof that the brown bag in Piemonte's possession at 9:05 a.m. contained heroin because it is unlikely that arrangements were then being made for a sale to Harris who did not telephone Frank until 11:45 a.m. But this argument overlooks the preliminary discussion the preceding week and fails to explain the negative communications to Piemonte as he drove by Del's Restaurant in the morning. Moreover, the contacts between Frank and Piemonte at Del's Restaurant at 9:30 p.m. and in Frank's car after the delivery to Harris persuasively indicate that Piemonte handled both the heroin and the proceeds of sale. Evidence that Guido was the source of the heroin that was transferred from Piemonte to Harris includes the fact that Del's Restaurant was the place Piemonte and Frank met at 9:33 p.m.; the fact that Piemonte had just come from Guido's residence, and the unusual behavior of Piemonte and Guido in front of Guido's apartment at 9:05 a.m. The fact that eight ounces of heroin were actually delivered by Frank in a

brown paper bag is, of course, undeniable. And finally, since we accept the jury's conclusion that Guido was the source of kilo sold in January, Michael's remark that the source was the "same as before" is adequate corroboration to establish the sufficiency of the evidence relating to the October transaction.[3]

We have carefully considered the trial judge's finding of not guilty in the separate trial of Piemonte. As the government points out, a judge may properly find that the evidence is strong enough to submit to a jury even if he is not convinced beyond a reasonable doubt that the defendant is guilty. Of greater significance, however, is the fact that his finding in the Piemonte case need not be consistent with his rulings in the Guido case. The question before us is whether there was enough evidence of Guido's guilt to support the jury's verdict. Our analysis of the record persuades us that it was sufficient. We are also persuaded that there was sufficient evidence of actual or constructive possession by Guido to support the statutory presumption of knowledge of illegal importation. *United States* v. *Holmes,* 452 F.2d 249, 258 (7th Cir. 1971). We find no error in the denial of the motion for a new trial on the ground of newly discovered evidence, or in the claimed violation of the Jencks Act. Finally, although the court's comments that the jury could not see the transcript may have implied, improperly, that the jury could not make any inquiry of the court during these deliberations, that comment certainly was not reversible error.

The judgment on Counts 1, 6, 7, 10, and 11 is affirmed.

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[3] The same source statement was admissible in connection with the October transactions because it was made in furtherance of a conspiracy in which Guido's participation was established by other evidence.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 4, 1973.

Before
Hon. THOMAS E. FAIRCHILD, Circuit Judge
Hon. JOHN PAUL STEVENS, Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 72-1782 vs.

LOUIS GUIDO,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
(71 CR 221)

On consideration of the petition for rehearing filed in the above-entitled cause,

IT IS ORDERED that the petition for rehearing in the above-entitled appeal be and the same is hereby denied.

APPENDIX C

DECISION AND ORDER OF THE TRIAL JUDGE AS TO PIEMONTE

Defendant Rudolph Piemonte was indicted on March 5, 1971 for conspiracy to sell illegally imported narcotic drugs beginning on or about August 1, 1970 (21 U.S.C. §174) and for the illegal sale of 254.25 grams of heroin on October 14, 1970 (26 U.S.C. §4705(a)). His three alleged co-conspirators have either pleaded guilty or have been found guilty, but defendant Piemonte was not present when the other defendants were arrested or tried. He turned himself in shortly after their trial was completed and has now submitted to a belated bench trial. The parties have stipulated to the evidence, most of which was heard at the trial of the other defendants, and have filed thorough briefs in support of their respective positions.

The evidence against Piemonte is almost entirely circumstantial, and his guilt depends on whether he was a member of a conspiracy. For the purpose of deciding this question, we will assume that a conspiracy did exist between the other defendants for a considerable time before and after October 14, 1970, based on the weight of the evidence. The only evidence connecting Piemonte with this conspiracy concerns the activities on October 14, 1970, and his disappearance at the time when the other defendants were arrested on February 23, 1971. Although there is no doubt that Piemonte associated with the conspirators on the date in question, there is no evidence that he participated in any of their rather extensive illegal activities on any other dates shown in the record (with the exception of January 21, 1971 concerning which date there exists a reasonable doubt that he was in the United States at all).

On October 14, Piemonte first joined the defendant Guido at the latter's place of employment, Del's Restaurant, at about 9 a.m. They left almost immediately and walked to Guido's apartment a few blocks away. They came out at about 9:20 a.m. and Piemonte had a small brown paper bag in his hand. A surveillance agent testified that Guido pointed to the bag, whereupon Piemonte tucked it under his arm inside his jacket. A sale of heroin in a brown paper bag was consummated by Franklin Carioscia, a co-conspirator, that night at about 10 p.m., but no brown paper bag made an appearance in the meantime.

Piemonte and Guido separated that morning without further incident, Piemonte returning to the vicinity of his home nearby. At 9:40 a.m. he was seen driving his own car with defendant Michael Carioscia. After driving around the vicinity of Del's restaurant, Piemonte went in and out twice for brief intervals and then drove away with Michael Carioscia. No one saw any brown bag or any other items change hands and no conversations were overheard. There is, in short, no evidence of what transpired at these brief meetings between Piemonte and Michael Carioscia or Piemonte and Guido.

That afternoon at about 2:30 p.m. the government's undercover agent arranged to buy heroin from Franklin Carioscia at 8 p.m. At 7:55 Franklin telephoned the agent, postponed the closing to 10 p.m., and went to Del's restaurant. At 9:30 p.m. Piemonte went into the restaurant for a few minutes and then went home. Franklin then left the restaurant and delivered heroin to the government agent in a brown paper bag at the appointed time.

After this sale, Franklin returned to the vicinity of Piemonte's home, picked him up, drove around the block, and then dropped him off. Franklin and Michael Cari-

oscia, incidentally, are brothers, but they had no common participation in the events of October 14, 1970 except that Michael rode around with Piemonte in the morning and Franklin met with him in the evening.

The purchase money which Franklin had received for the heroin that night was never recovered. The government apparently infers that Piemonte received money from Franklin after the sale and had previously given the brown paper bag of heroin to him at Del's restaurant at about 9:30 p.m. The difficulty with these assumptions is that they leave too much to speculation. There is no logical reasons for Piemonte to get heroin from Guido at 9:20 a.m. and carry it around all day for a sale which was arranged at 2:30 p.m. to be consummated that night. And there is no apparent reason for Piemonte to return to Guido's place of employment at 9:30 p.m., if he had received heroin from him at 9:20 a.m. If Piemonte did in fact have the heroin all day, as the government apparently contends, there is no reason why Franklin would postpone the sale from 8 p.m. to 10 p.m. in order to "put the package together," as he told the buyer.

It can be seen from the foregoing that the government's case against Piemonte boils down to inferring guilt by association. It is true that his association with a proven conspiracy on the date of an illegal sale is suspicious and difficult to account for rationally. But on the other hand he should not be convicted without some hard evidence that he knowingly participated in the conspiracy and sale, and the evidence does not convince me of this beyond a reasonable doubt.

The doubt arises from several elements, in addition to those already mentioned. First, there is no evidence that

Piemonte ever possessed any heroin or any money from the sale of heroin, although proof of this is not essential. No direct connection has been established between a brown bag seen in his hand at 9:20 a.m. and one containing heroin which was delivered by Franklin Carioscia at 10 p.m. that night. If Piemonte obtained heroin from Guido at 9:20 a.m., there would be no conspiratorial reason for him to go back to Guido's place of employment at 9:40 p.m., with Michael Carioscia and again at 9:30 p.m., with Franklin Carioscia. All of these comings and goings are difficult to relate rationally to a transaction that occurred at 10 p.m. that night. We suspect that, if Piemonte was a member of the conspiracy and did get a brown bag of heroin from Guido at 9:20 a.m., it was sold to someone other than a government agent long before 10 p.m. and the evidence of such a transaction and hence the contents of the brown bag is entirely lacking. Piemonte therefore was not tied into the transaction alleged in the indictment beyond a reasonable doubt, and there is no other evidence connecting him with the conspiracy other than mere association with its members.

The government likewise leans heavily on the fact that Piemonte could not be found when the other conspirators were arrested on February 23, 1971 and did not turn up until after they had been found guilty more than a year later. We agree that evidence of flight tends to confirm guilt, at least when there is independent evidence of that guilt. In this case, however, we have found such evidence to be deficient. Without more of a circumstantial case than has been found in this case, disappearance in and of itself has no foundation on which to erect an inference of guilt.

Furthermore Piemonte's disappearance is too ambiguous to convict him. He left behind no incriminating evidence, other than the arrest of his friends. He may well have been afraid to stand trial with them, knowing something about their activities and the circumstances of their arrest. His "flight" therefore can support the inference of innocence as well as the inference of guilt and does not bolster the government's case in chief.

In conclusion, although Piemonte's activities on October 14, 1970 were sufficient to indict him and to cause him to stand trial, the evidence and reasonable inferences therefrom fall far short of proving him guilty beyond a reasonable doubt. This conclusion, however, casts no doubt on the guilt of the other defendants.

Rudolph Piemonte is therefore found not guilty of the charges in Counts I, VI, and VII of the Indictment.

Enter:

Thomas R. McMillen
Judge, U.S. District Court

APPENDIX D

THE EVIDENCE IN THE CASE

Testimony of Dave Harris, Jr.

Dave Harris, Jr., who was working for the Bureau of Narcotics, was paid by the agents whenever he needed money (Tr. 125), which finally totalled the sum of $5,500 between July, 1970 and February 23, 1971 (A. 12).

He first met Franklin Carioscia in 1961 (A. 5). He then went looking for Frank in July, 1970, and found him on Lexington near Loomis Street in Chicago. Frank told him that he had a food store at 810 South Loomis Street; they agreed to meet some future day.

They met again on August 8, 1970, when they had a discussion in which Frank told Harris he could sell him heroin for $1,000 an ounce (A. 5). Harris also talked with Michael Carioscia in front of the fruit store. Michael asked if he could use cocaine.

He saw Michael again at the fruit store on August 11, 1970 and asked Michael to get him $6,000 worth of heroin (A. 5). Michael told him that Frank would be able to take care of him on August 19. He talked to Michael again on August 14; Michael told him that Frank said to give Harris whatever he (Harris) wanted (A. 6). On August 17 Harris went to the fruit store; Frank told Harris to meet him on August 19.

They met that date in front of the fruit store, where Frank got in Harris' car and they drove a few blocks away. Harris gave Frank $6,000 which he had previously obtained from the narcotic agents and Frank gave him a

towel, which he later turned over to Agent Aurielo (A. 6). (The towel was later shown to contain approximately 6 ounces of heroin).

Harris and Frank met again on September 1, 1970, and they arranged that Frank would sell Harris 11 ounces of heroin for $10,000. On September 2, Harris obtained the money from the agents and met Frank in front of the fruit store, from where they drove away. While in the car, Harris gave Frank the $10,000 and Frank gave Harris a black sock (later shown to contain heroin). (A. 7).

On neither August 19 or September 2, did Frank give Harris an order form for use in the transfer of the narcotics; nor did Harris have an order form for that purpose (A. 7).

On October 8, 1970 they talked in person about another sale. Harris then talked with Frank on the telephone on October 14. They met at 1:30 p.m. on October 14, and Harris told Frank that he would only have $6,000. Frank told him he would pick Harris up in front of the Cook County Hospital. They had a telephone conversation on October 14 between 8:00 and 8:30 p.m., during which Harris said that he would bring $8,000 worth of heroin. He was given the money by narcotic agents. Frank picked up Harris who was standing in front of the County Hospital. They drove a few blocks away and Harris gave Frank $8,000 for 9 ounces of heroin. He did not present an order form for the transfer of narcotics; neither did he obtain a form from Frank (A. 8).

On December 4, 1970, Harris went to Tony's Lounge in the 1300 block on South Laramie, Cicero, Illinois, and told Michael he wanted $6,000 worth of heroin (A. 8). Michael told him to meet him that night, at which time Michael gave

him narcotics and he gave Michael $6,000, which he had previously received from the agents (A. 8). Neither of them had an order form for the transaction (A. 8).

On January 5, 1971, he met Michael and asked for a kilo of heroin. Michael said, "Things are tight right now." Harris then met with Michael the next day, January 6, and Michael told him he could sell a kilo for $35,000. They negotiated the price to $33,000 (A. 9). Harris asked Michael about cocaine; Michael said he could provide cocaine for about $1,000 an ounce (A. 9). They talked on the telephone on January 13, Harris said he would be able to make the purchase on January 18, but that the price was too high (A. 9).

He again met with Michael at Tony's Lounge at 1333 South Laramie, Cicero, on the afternoon of January 18, 1971, and said that he would only have $32,000. Michael said that that was okay (A. 9). He again met Michael at Tony's Lounge on the afternoon of January 19, 1971. Michael told him to go down to the fruit store at 7:45 p.m., and that he would get the kilo from Frank (A. 10).

Harris was asked if he recalled any other conversation he had with Michael and he said, "I don't remember." The prosecutor put it directly:

> "Did you have some conversation with respect to Mr. Carioscia's sources?"

Harris replied that he asked Carioscia if he was getting it from the same people as before. Carioscia "said he was getting the heroin, but he had a different source for the cocaine." (A. 10).

On the evening of January 19, 1971, Harris received $32,000 from the narcotic agents and drove to 810 South Loomis where Frank got in his car. Frank told him that

they were not going to do anything that night because, "There is too much heat in the neighborhood." Frank inquired whether Harris had the money; Harris said he did. Whereupon Frank said, "I would sure like to do it, but there is too much heat here tonight." (A. 11). Frank told him to go to Tony's Lounge the next day and see Michael for instructions (A. 11).

On January 20, 1971, he went to see Michael at Tony's Lounge; Michael told him the deal was set for 7:30 p.m. That evening, he again obtained the $32,000 from agent Aurielo, which money was put in a Carson Pirie shopping bag (A. 11). He then drove to the fruit store on South Loomis Street, where Frank got in his car and they drove north on Loomis to Flournoy Street. Frank gave him a package which contained narcotics, and he gave Frank the Carson Pirie shopping bag with the money. Neither had an order for the transaction (A. 11).

On February 23, 1971, he went to Tony's Lounge on Laramie Street and talked with Michael. They drove together in a car on the northside of Chicago to St. Louis Avenue near the Kennedy Expressway, where they met Frank. Frank would not sell him any narcotics for the $6,000, which Harris had, but told him that he would sell him 33 ounces for $32,000, and that he would go to the store and wait (A. 11). (Frank was later arrested in front of the fruit store by narcotic agents in the possession of heroin A. 15).

On cross-examination, Harris was certain that the transaction on January 20, 1971, took place at 8:00 p.m. when Frank got out of his car at Loomis and Flournoy Streets. He knew, because he checked the time by looking at his clock (A. 12).

Testimony of Narcotics Agents

Various narcotic agents testified to having listened to telephone conversations between Harris and the Carioscia brothers on various dates and to having listened to Harris' conversations with Frank by means of a Kel set transmitter placed on Harris when Harris went to meet Frank Carcioscia.

The events of October 14, 1970 as to Counts 6 and 7

The first date about which Guido's name was mentioned is agent Frank Cruz' testimony that at about 9:00 a.m., on October 14, 1970, he saw Guido leave the address where Guido lived at 633 South Laflin Street, Chicago, and walk south on Laflin to Del's Restaurant at 1459 Lexington, one block south of where petitioner lived. Del's Restaurant was where defendant Guido was employed (A. 17). About five minutes later, agent Cruz saw Rudolph Piemonte enter the restaurant, and a few moments later, leave with Guido and walk toward 633 South Laflin Street (A. 17-18). As Guido and Piemonte were walking, they were talking and waving their arms (A. 17-18). They entered 633 South Laflin, and at about 9:20 a.m., came out of the entranceway. Piemonte was carrying a brown paper bag in his left hand. They were still engaged in conversation. Guido pointed to the brown bag; then Piemonte rolled the brown paper bag up and placed it under his arm. (A. 18). Piemonte walked east on Flournoy Street to about 1437 West Flournoy Street (where his mother lived)* and Guido went back to Del's Restaurant (A. 18).

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* Piemonte lived at 1448 Flournoy; his mother and brother lived across the street, at 1447 Flournoy (A. 19).

Then Piemonte is seen at 9:40 a.m. in the company of Michael Carioscia. Agent Cruz saw Piemonte and Michael Carioscia drive to Del's Restaurant (A. 18).

Cruz testified that when he, supervising agent Janet, and four other agents arrested Guido on the early morning of February 24, 1971, none of the agents searched the house (A. 19). None of the government's pre-recorded or marked money or narcotics was ever found either in Guido's house or on his person (A. 29).

Agent Rusycki testified that on October 14, 1970, at about 3:00 p.m., he saw Frank Carioscia leave his fruit store at 810 South Loomis Street and drive to Del's Restaurant at Laflin and Lexington Streets. He happened to see Frank engaged in conversation with Guido in the doorway at Del's; then Frank drove back to his fruit store. About 3:30 p.m., Frank drove his car and parked near Del's Restaurant, and then entered it. At 5:00 p.m., he noticed Frank's car parked across the street from 633 South Laflin Street; he watched the car until 6:30 p.m. (A. 20). He had no idea what Frank was doing in the fruit store; nor did he have any idea what Frank was doing inside Del's Restaurant (A. 20). The apartment building at 633 South Laflin Street was a three story building with at least 12 apartments (A. 20).

Agent Young testified that at about 9:30 p.m. on October 14, 1970, he saw Rudolph Piemonte go into Del's Restaurant, come out about three minutes later, and walk north on Laflin Street to Flournoy Street, where he turned east (A. 23), toward his home. (A. 23). About 10 minutes later, Frank Carioscia came out of Del's Restaurant; and at about 10:30 p.m., he saw Frank go into Whitey's tavern, located on the west side of Laflin and Lexington Streets. (A. 23).

Agent Janet testified that on October 14, 1970, he saw Frank Carioscia leave Turzitti's Tavern at about 8:30 p.m. and drive away (A. 25). At about 9:30 p.m., he saw Rudolph Piemonte leave 633 South Laflin Street and walk to Del's Lounge. About three minutes later, he saw Piemonte walk back to Laflin Street to Flournoy and turn east on Flournoy (A. 25-26).

The events of January 19 and 20, 1971, as to Counts 10 and 11

January 19, 1971

Agent Aurielo testified he saw Harris go into Tony's Lounge, on South Laramie Avenue, where Michael Carioscia worked, at about 1:00 p.m. on January 19, 1971, and depart about five minutes later (A. 13). At about 1:40 p.m., Aurielo saw Michael Carioscia and Guido leave Del's Restaurant, enter Michael's car and drive to a drug store at Racine and Taylor Streets, where they went in and returned a few minutes later (A. 14). Michael then drove Guido to Loomis and Taylor Streets, where they parked, left the car, returned a few minutes later and drove to Frank's fruit store, 810 South Loomis Street, where they double parked (A. 14).

Agent Young had testified that earlier, at about noon or 12:30 p.m., on January 19, 1971, he saw Frank Carioscia drive his car to the front of 633 South Laflin Street and go into the building at that address; Frank came out about ten minutes later and drove away (A. 23). At about 7:20 p.m. on January 19, 1971, he saw Frank enter Whitey's Lounge; and also immediately he saw Rudolph Piemonte enter the lounge. At about 7:40 p.m., Frank left the tavern and drove to his store at 810 South Loomis Street. He later saw Frank get in Harris' car and saw them drive around (A. 23).

Agent Janet testified that on January 19, 1971, at about 1:00 p.m., he saw Harris go into Tony's Lounge on South Laramie Street and come out about five minutes later. He then saw Michael Carioscia come out of the tavern and drive away. He later saw Michael in the vicinity of Flournoy and Laflin Streets, when Guido was in Michael's car. They drove to a drugstore at Taylor and Racine Streets, which store they entered at about 1:45 p.m., and came out at about 1:50 p.m. (A. 26-27). They then drove to Frank's fruit store at 810 South Loomis Street, where another man got into the car and Michael drove to 651 South Wells Street, where the Galler drug company was located. The unidentified man went into the drug company entrance, came out about a minute or so later, and got back in the car, which then was driven to the area of Lexington and Laflin Streets (A. 26-27). About a half hour later, he saw Guido as a passenger in a blue truck with an unidentified driver. The truck drove around the block for about ten or fifteen minutes, and then Guido left the truck and went into Del's Lounge (A. 27). Later, that afternoon, he saw Guido enter his residence. Some time after 8:00 p.m., he saw Frank Carioscia drive away from 633 Laflin Street to his own residence at 700 Ada Street (A. 27).

January 20, 1971

This is the evening when Harris purchased $32,000 worth of narcotics from Frank Carioscia—at about 8:00 p.m. according to Harris (A. 12), and at about 7:30 p.m. according to agent Aurielo (A. 15). Agent Aurielo testified that when Frank Carioscia alighted from Harris' car at Loomis and Flournoy Streets, Frank was carrying the white shopping bag which Aurielo had previously given to Harris. Frank left Harris' car at about 7:32 or 7:33 p.m. (A. 15).

At about 7:55 p.m., he saw Frank come out of the Guido residence; Frank was not carrying any bag (A. 15). Frank walked to Lexington and Loomis Street where he entered his car and drove to Turzitti's Lounge at 1121 South Racine Street. At about 8 p.m., he saw Frank Carioscia, Guido, and Linda Brewer leave the tavern. Frank drove Guido back to Guido's residence and Guido entered it. Frank went to Whitey's Lounge and entered the tavern (A. 15).

There were about fifteen agents in or about the vicinity conducting the surveillance (A. 16). As Frank Carioscia walked away from Harris' car south on Loomis Street towards Lexington, he was walking away from Guido's house (A. 16). The most direct route to Guido's house would be on Flournoy to Laflin (A. 16).

None of the agents went into Guido's house on the night of January 20, 1971 to see if the $32,000 was there (A. 16).

Agent Young testified that at about 7:45 p.m. on January 20, 1971, he saw Frank Carioscia walk north on Laflin from Lexington carrying a white bag with initials "CPS" thereon, and that Frank went into the 633 South Laflin Street address at about 7:45 p.m. and exited about ten minutes later, without anything in his hands (A. 24). He did not see Frank go into or come out of any particular apartment when Frank went into the areaway at 633 South Laflin Street. There were probably a dozen apartments at that address (A. 25).

Supervising agent Janet testified that on January 20, 1971, he saw Frank Carioscia in Harris' car at about 7:30 or 7:35 p.m. on Loomis Street near Flournoy. Frank got

out of Harris' car carrying a Carson's shopping bag; he walked south on Loomis, then turned west on Lexington, out of the agent's view (A. 28). Janet lost view of Frank Carioscia for a period of time (A. 28). He searched for Frank, and later found him again on Lexington between Loomis and Laflin, rounding the corner of Lexington with the bag. He saw Carioscia walk north on Laflin Street and stand in front of Guido's door at 633 South Laflin Street (A. 28). Ten minutes later, Frank came out of that address without a bag, and walked south on Laflin Street. At about 8:45 p.m., he saw Frank drop Guido off at Guido's residence; then Frank went into Whitey's tavern (A. 29).

Frank's father, Anthony Carioscia, lived in the 1400 block of Lexington Street between Loomis and Laflin Streets. Frank could have stopped in the building where his father lived, as he walked on Lexington from Loomis to Laflin Street (A. 29). As a matter of fact, Frank could have gone into any of the buildings on Lexington Street, between Laflin and Loomis Streets (A. 30). It was eight or ten minutes after he lost sight of Frank as Frank walked west on Lexington Street before he again saw Frank rounding the corner at Lexington and Laflin Streets (A. 30). Frank "may well have entered an alley and remained in a gangway or entered a building. I do not know." (A. 30). Agent Janet did not know what Frank was doing in the eight or ten minutes when Frank was out of view (A. 30).

Events In Turzitti's Lounge On The Night Of January 20, 1971.

When Frank Carioscia was seen to have gone to Guido's apartment at about 7:45 p.m. on January 20, 1971, agents testified that Frank left the Guido residence area at about

7:55 p.m., walked to his car on Loomis, south of Lexington Street, and then drove to Turzitti's Lounge at 1121 South Racine Avenue arriving there about 8:10 p.m. (A. 35). Agent Koepp followed Frank into the lounge, and saw Guido sitting at the bar with two females. Koepp took a seat to the east of Guido and the girls. Agent Biss then came in and took a seat to the east of Koepp. Then Frank took a seat next to one of the girls, Linda Brewer, who was sitting to the west of Guido. He saw Guido give some money to Frank Carioscia. Guido bought drinks for Frank and the two girls with a $20 bill which Guido took from a large roll of bills from his left pocket. The money he gave to Frank came from Guido's right pocket (A. 35-36).

On cross-examination, agent Koepp testified he made notes of his observations, but destroyed them after he related the contents of his notes to Agent McNamara. Shown McNamara's reports, it nowhere appeared that Koepp was in Turzitti's Lounge (A. 36). There were empty seats to the east of Guido and empty seats to his west. There might have been music going on, he did not recall (A. 37).

Agent Thomas Thompson testified he entered Turzitti's Bar at about 8:10 p.m. and saw Guido sitting in the bar with two young ladies and saw Frank Carioscia sitting at the rear of the bar talking with a man. Thompson sat down at the bar six or seven feet to the west of Guido and ordered a beer. Then Frank came and sat down two stools to the left of Thompson and to the right of Guido. Guido took out a large roll of bills from his right hand pocket and gave it to Carioscia. About a minute later, Carioscia walked to where Guido was sitting; he heard Guido say to Carioscia, "How did it go?", to which Carioscia replied, "Okay" (A. 39).

On cross examination, agent Thompson testified he did not take notes; neither did he tell anybody of his observations with respect to the events he described (A. 40).

Evidence On Behalf Of Defendant

Sam Mancino, the bartender at Turzitti's tavern testified the tavern always had a juke box and was playing mostly at night, and that there was no reason why the juke box would not be playing on January 20, 1971. There were ten stools in the place (A. 44).

Mrs. Linda Brewer testified she was with Mr. Guido and his niece in Turzitti's tavern on a night in January, 1971. She did not see Guido give a roll of bills to Frank Carioscia; nor did she hear Guido say to Frank, "How did it go?"; or Frank answer, "Okay". Guido drank quite heavily that night; he had twelve or thirteen drinks (A. 44).

Mrs. Ann Garippo, niece of Guido, testified she lived in a flat upstairs of the tavern and that on January 20, 1971, she saw her uncle with Mrs. Brewer and with Frank Carioscia between 8:00 p.m. and 8:30 p.m. She never saw her uncle give Frank a large wad of bills. The juke box was playing music. She never heard Guido say to Frank, "How did it go?", or Frank answer, "Okay". She was near Guido all the time she was there (A. 44-45).

Miss Elaine Schain testified she was a substitute school teacher and was a baby sitter for the Guidos who lived at 633 South Laflin Street where there were fifteen or sixteen apartments located. She was in the apartment on Wednesday, January 20, 1971, having arrived at 6:15 or 6:30 p.m.; she remained for several hours. The Guidos had a child, about eleven months old. During the evening, Frank Carioscia came to the apartment. She knew him, in-

asmuch as she lived at 732 South Loomis Street, a block from Frank's fruit store at 810 South Loomis, where she shopped. She never saw Frank with a shopping bag similar to Govt's Exhibit 9, on January 20, 1971. When Frank came to the apartment, he brought groceries. He carried them in a brown paper bag or a box—she could not remember which. Frank had delivered groceries there on other occasions. On this night, he delivered fruits and vegetables and stayed about five minutes (A. 45-46).

Mrs. Mary Guido, defendant's wife, testified that their child was born on February 15, 1970, and that they employed Elaine Schain as a babysitter. There were at least sixteen apartments in the unit known as the Circle Apartments, at 633 South Laflin Street. She and defendant occupied Apartment 1 in the unit. Guido was home when Miss Schain came to the apartment, but then left about 7:00 p.m., or maybe later. Frank Carioscia came to the apartment close to 8:00 p.m. on January 20, 1971. He did not come in with any Carson, Pirie, Scott shopping bag, nor did he bring to her apartment the sum of $32,000. When her husband came home that night, he was intoxicated. Guido was employed at Del's Tap and Restaurant during 1970 and January, 1971. The restaurant was at 1459 West Lexington Street, one block from her residence. Frank would deliver groceries to her apartment because she was in the habit of calling the produce store two or three times a day and she would order the groceries from Frank, his father, or from another man who works there (A. 46-47).

The trial court's comments at the close of the government's case and at the close of all the evidence.

When the government offered into evidence the narcotics received by Harris from Frank Carioscia on August 19, 1970, the court asked the government, "How do you get Mr. Guido into a conspiracy on August 19?", to which the government replied that Harris had asked Michael Carioscia on January 18, 1972 if he was getting heroin and cocaine from the same sources and that Michael said, he "was getting the heroin, but he had a different source for the cocaine" (A. 42). The court replied, "That source could be anybody . . . How do you tie Mr. Guido into being the source?" (A. 42). The government responded that the only thing that tied Guido "into being the source" is "where Guido was seen with respect to the acts as they occurred" (A. 42). The court stated that he did not know why the government went into the earlier (August, September and December transactions) because "it is a rather tenuous connection" (A. 42).

The court was "bothered" about evidence of transactions earlier than October 14, 1970 (A. 42). The court stated that it could "not see any way of correcting it short of a new trial. I'm reluctant to start a new trial on this case at this juncture . . . I think I will rule that there is enough of a tenuous connection and to let them stand. If I am wrong, I will just have to decide that after the close of all the evidence or after the jury has made its verdict. I would like to give this some further thought. I am not precluding this point, but I am precluding this at this stage, because I do not know how to remedy it." (A. 43).

Defense moved for a mistrial (A. 43).

The court stated, "That is what I might have to do if I keep these exhibits out because they might be so prejudicial having been brought into the case that it is not fair to let it go to the jury" (A. 43).

However, all the narcotic exhibits were admitted into evidence, over objections (A. 43).

Instructions of the court precluding the jury from requesting assistance about the evidence.

Just before the court sent the jury to deliberate upon their verdict, it advised the jury: "Now, ladies and gentlemen, the court will be here through your deliberations. I might mention that occasionally juries ask if they can see a transcript of testimony because of the court reporter's presence. That I can answer for you in advance. It is not permitted. But if you have any other problems which require a response by the court, you can submit them in writing through the U.S. Marshal (A. 49).

Defendant moved for a mistrial (A. 49).

The question posed by the jury.

The jury commenced deliberations at 3:30 p.m. (A. 49). At 6:00 p.m., the jury sent to the court a question in writing, as follows: "Are we to construe Count 1 of the indictment to begin on October 14, 1970 for Louis Guido as opposed to August 1, 1970 as stated in the first paragraph of Count 1 of the indictment?" (A. 49).

The court advised the jury in writing, "Yes." (A. 49).

The verdict was returned at 8:15 p.m. (A. 49).

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-592

LOUIS GUIDO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1973. A petition for rehearing was denied on September 4, 1973. The petition for a writ of certiorari was filed on October 3, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to sustain petitioner's conviction.

2. Whether there was sufficient proof of constructive possession of heroin by petitioner, and whether the court's instruction relating to knowledge of illegal importation was proper.

3. Whether the government complied with the requirements of the Jencks Act.

4. Whether the court's instruction relating to requests to see the trial transcript was proper.

5. Whether the court properly denied petitioner's motion for a new trial based on newly discovered evidence.

6. Whether petitioner was deprived of meaningful appellate review.

STATEMENT

A twelve-count indictment (R. Doc. 2) returned in the United States District Court for the Northern District of Illinois charged petitioner and co-defendants Franklin ("Frank") Carioscia, Michael Carioscia, and Rudolph Piemonte with having conspired to sell and having knowingly sold, not in pursuance of a written order form, heroin imported contrary to law, in violation of 21 U.S.C. (1964 ed.) 174 and 26 U.S.C. (1964 ed.) 4705(a). Petitioner was tried by a jury, convicted on the five counts in which he was charged, and sentenced to concurrent terms of twenty years' imprisonment. The court of appeals affirmed (Pet. App. A).[1]

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[1] Prior to petitioner's trial, Frank and Michael Carioscia pleaded guilty and were sentenced to ten years' imprisonment. Piemonte, who was a fugitive at the time of petitioner's trial, was subsequently apprehended and acquitted at a bench trial upon the stipulated evidence from petitioner's trial.

The facts are set forth in the opinion below (Pet. App. A 1-7). Briefly, Dave Harris, a government informer, purchased heroin from the Carioscia brothers on five occasions: August 19, 1970 (App. 5-6; Tr. 17-19, 22-25),[2] September 2, 1970 (App. 7; Tr. 29-32), October 14, 1970 (App. 7-8; Tr. 50-56), December 4, 1970 (App. 8; Tr. 60-62) and January 20, 1971 (App. 9-11; Tr. 65-82). Petitioner was charged with conspiracy (Count 1) and participation in the heroin transactions of October 14, 1970 (Counts 6 and 7) and January 20, 1971 (Counts 10 and 11).

On January 19, 1971, Harris asked Michael Carioscia if he (Michael) was getting the heroin and cocaine "from the same people as before." Michael replied that "he was getting the heroin [from the same source] but he had a different source for the cocaine" (App. 9-10; Tr. 70-72, 243; V Tr. 80).[3] The following night (January 20th), pursuant to instructions from Michael Carioscia, Harris picked up Frank Carioscia and exchanged $32,000 in cash for 39 ounces of heroin. While being watched by BNDD agents, Frank got out of the car and, carrying the $32,000 in a white shopping bag with the letters "CPS" printed on its sides, walked to and entered petitioner's residence three blocks away (App. 11, 28, 31; Tr. 80, 160, 249-251, 358; V Tr. 97-98, 100-101, 103). Ten minutes later he left petitioner's residence, no longer carrying the bag (V Tr. 101). He went immediately to a nearby tavern, where he met petitioner (App.

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[2] "App." refers to petitioner's appendix on appeal, a copy of which we are lodging with the Clerk of this Court. "Tr." refers to the trial transcript.

[3] "V Tr." refers to volume V of the transcript, the only volume not paginated consecutively.

32, 35; Tr. 335). Petitioner handed Frank a large roll of bills and asked "how did it go?", to which Frank replied "Okay" (App. 36, 39; Tr. 702-704; V Tr. 191-194). After petitioner bought a round of drinks, Frank drove him home (App. 36, 39; Tr. 260, 705; V Tr. 195).

The events surrounding the October 14th heroin transation, for which petitioner was also charged and convicted, culminated in Frank Carioscia's delivery to Harris of a brown paper bag containing eight ounces of heroin. The earlier series of meetings that day between petitioner and his co-defendants are detailed in the opinion below (Pet. App. A 5-7). We note that on the afternoon of October 14th, shortly after Harris told Frank Carioscia he wanted to buy heroin that evening, Frank met petitioner at petitioner's restaurant; he was there again at 8:30 p.m., immediately after Harris told him the exact amount of heroin he needed; and he left from there at 9:30 p.m. to deliver the heroin to Harris (App. 8, 20, 25; Tr. 47-50, 148, 208, 400; V. Tr. 21, 70-77).

ARGUMENT

1. The evidence was sufficient to support petitioner's conviction on the conspiracy count and all four substantive counts.

a. The evidence overwhelmingly established that the Carioscia brothers were engaged in a narcotics conspiracy as early as August 19, 1970, when the first sale was made to Harris. From the large quantities of heroin involved in all of the sales, from references made to other parties involved ("his people", Tr. 12; their "source", Tr. 66, 70, 72), and from subsequent events on October 14 and January 19 and 20 in which petitioner was a participant, the jury had ample evi-

dence from which to infer that petitioner was a knowing member of the conspiracy.

As to the January 20th transaction, Michael Carioscia met with petitioner immediately after Harris ordered a large quantity of heroin from Michael on January 19th (App. 14, 27, 31, 37-38; V Tr. 80, 136). On the night of January 20th, Frank Carioscia took the shopping bag with the $32,000 received for the heroin to petitioner's residence; then Frank proceeded to a tavern where he met petitioner, received from petitioner a large roll of bills, and replied "Okay" to petitioner's query, "how did it go?".

The evidence of petitioner's participation in the January transaction also corroborates the evidence of his participation in the October 14th transaction, because Michael Carioscia told Harris in January that he was getting the heroin from the same source as before. From the strong evidence that Guido was the source of the January heroin, considering Michael's statement and the fact that on October 14 Frank Carioscia met petitioner at petitioner's restaurant before delivering the heroin, there was ample evidence for the jury to conclude that petitioner was also the source of the October heroin.

In summary, the evidence was such that petitioner's guilt was not, as he contends, predicated on "mere association", "suspicious circumstances", or "speculation", and petitioner's reliance on cases involving such insufficient proof is misplaced.

b. Petitioner complains that the court erred in admitting evidence with respect to narcotics transactions involving the Carioscia brothers which occurred earlier than October 14, 1970 (Pet. 24-26). The trial

court, concluding that evidence of narcotics transactions prior to October 14, although indicative of an existing conspiracy, was too speculative relative to petitioner's participation in the conspiracy (Tr. 994), instructed the jury as follows (Tr. 1103):

> Offenses committed by persons other than Louis Guido when he was not a member of a conspiracy may be considered by you only for the purpose of determining whether an unlawful conspiracy existed which Louis Guido may later have joined. You are instructed that Louis Guido was not a member of any conspiracy before October 14, 1970, and you must determine from the evidence and instructions in this case whether he participated in any unlawful conspiracy as charged in the indictment on or after that date.

This was a proper instruction. The evidence of the earlier narcotics transactions was admissible and could be considered in determining whether a conspiracy existed which petitioner joined on or after October 14, 1970. It is well settled that "the declarations and acts of the various members, even though made or done prior to the adherence of some to the conspiracy, become admissible against all as declarations or acts of co-conspirators in aid of the conspiracy." *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 393.

c. Petitioner contends that co-defendant Piemonte's acquittal at a subsequent bench trial on the stipulated facts from petitioner's trial is inconsistent with a verdict of petitioner's guilt. There is, however, no inconsistency in the findings. The indictment did not allege that Piemonte was in any way involved in the January 20th heroin transaction, with respect to which

the evidence—detailed above—showed that petitioner was the source of heroin sold to Harris on that date. Moreover, even in regard to the October 14th heroin transaction, Piemonte was not acquitted "on the same facts" which led to petitioner's conviction, as petitioner contends (Pet. 32). In addition to the events occuring on October 14th, in which Guido and Piemonte jointly participated, Michael Carioscia's declaration of January 19th revealed that his source on that date was the same as the source of the heroin on October 14th.

2. Petitioner contends that there was no proof of actual or constructive possession of the heroin by him and no proof of knowledge of illegal importation. Under 21 U.S.C. (1964 ed.) 174, unexplained possession of heroin gives rise to an inference that the possessor knew that it was illegally imported.[4] *United States* v. *Davis,* 461 F. 2d 1026 (C.A. 3). "That inference is equally reasonable if the defendant himself does not have physical possession but one of his subordinates in the illegal venture does." *United States* v. *Holmes,* 452 F. 2d 249, 259 (C.A. 7). As noted above, there was ample evidence from which the jury could have inferred that petitioner was the source of the heroin involved and had power to exercise dominion and control over the drug. See *Turner* v. *United States,* 396 U.S. 398; *United States* v. *Holmes, supra,* 452 F. 2d at 258; *United States* v. *Virciglio,* 441 F. 2d 1295 (C.A. 5).

The instruction relating to the presumption arising from possession of heroin, to which petitioner objects (Pet. 38), was taken from Section 17.01-1 of the La Buy instructions (36 F.R.D. 457, 608-609) and correctly

[4] Knowledge of illegal importation is no longer an element of the offense of possession. (21 U.S.C. 841)

states the law to be applied. See *United States* v. *Slaton*, 430 F. 2d 1109 (C.A. 7), certiorari denied, 400 U.S. 997.

3. Petitioner contends that the government violated the provisions of the Jencks Act (18 U.S.C. 3500). The Jencks Act specifies that the government, after a witness has testified on direct examination, shall produce upon request any statement of the witness in the possession of the government, which relates to the subject matter of the witness' testimony. 18 U.S.C. 3500(b). Here, BNDD Agent Thompson made no written notes of his observations at Turzitti's Lounge on January 20, 1971. He reported his observations orally to his BNDD superiors, and they were incorporated, together with surveillance reports from other BNDD agents, into one written report prepared by BNDD Agent McNamara. (V. Tr. 158, 202; Tr. 709-717). This report, with Thompson's name and the names of the other BNDD agents who contributed thereto included in the report (V. Tr. 202; Tr. 685), was proffered to petitioner at trial and introduced as Defense Exhibit 4 (Tr. 684). Hence there was no possible violation of the Jencks Act.[5]

4. Following the jury instructions but prior to its deliberations, the court advised the jury that it would not be allowed to *see* a transcript of testimony, but that any other problems requiring a response from the court could be submitted in writing through the United States Marshal (Tr. 1112). Defense counsel at trial (Tr. 1113-1114) mistakenly interpreted the court's advice to

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[5] *United States* v. *Missler*, 414 F. 2d 1293 (C.A. 4), certiorari denied, 397 U.S. 913, does not suggest, as petitioner implies (Pet. 41-42), that an agent must make written notes as a prerequisite to his report, nor is there any authority for such a contention.

preclude any request by the jurors to *hear* portions of the testimony *read* to them, and moved for a mistrial (Tr. 1113-1114). At that point, the court offered to hear any suggestions for clarifying what had been what had been said by additional instructions (Tr. 1114), but defense counsel elected not to pursue the matter further.

The preferable federal procedure is to have any necessary portions of the transcript reread to jurors in open court, rather than allowing jurors to see the trial transcript in the jury room. *United States* v. *Schor,* 418 F. 2d 26, 31 (C.A. 2). Petitioner engages in considerable speculation that because of the court's instruction that the jury could not *see* the transcript, the jury *might* have had questions which they were hesitant to ask (Pet. 48). The court's offer to give a subsequent clarifying instruction, and defense counsel's failure to pursue the court's invitation, forecloses any challenge to the instruction on appeal. Fed. R. Crim. P., Rule 30; *United States* v. *Francisco,* 410 F. 2d 1283 (C.A. 8).

5. The court properly denied petitioner's motion for a new trial on the basis of newly discovered evidence which showed that co-defendant Piemonte was in Mexico on January 19 and 20, 1971, contrary to the trial testimony of two BNDD agents that he was observed in Chicago on those dates. After a hearing, the court denied the motion, incorporating its findings in an order (R. Doc. 36), including, *inter alia,* the following:

a. Agents Young and Chown were the only government witnesses who testified that they saw Piemonte in Chicago on January 19 and 20, 1971, and at most that would cast doubt only on the accuracy or veracity of

the testimony of those two agents, but would not affect the testimony of other government witnesses as to the events of those or other days.

b. Piemonte's presence in Chicago on those dates was entirely collateral to the guilt or innocence of Guido.

c. The testimony of Agents Chown and Young which did tend to incriminate Guido on January 20, 1971, was corroborated by several other government witnesses.

d. The government could prove its case against petitioner, if a new trial were granted, without calling Agents Young and Chown, and there would be no opportunity for the defendant to use the newly discovered evidence.

e. The new evidence in question at most suggested mistaken identity and would not produce a different result at a new trial.

The trial court's conclusions are amply supported by the record. Neither Young, Chown, nor any other agent mentioned Piemonte in describing the surveillance of petitioner and the Carioscias on January 20, 1971, the date on which the actual exchange of 39 ounces of heroin for $32,000 took place, the money was delivered to petitioner's residence, and petitioner gave Frank a large roll of bills in Turzitti's Lounge. Moreover, none of the overt acts listed in Count 1, or any of the allegations in Counts 2-12 (R. Doc. 2), refers to Piemonte's activities on January 19 and 20, 1971. Elements essential to procuring a new trial based on newly discovered evidence include a showing that the evidence is material to factual issues at trial, and not merely cumulative or impeaching the character or credit of witnesses, and that it is of such nature that it would probably produce a different verdict in event of retrial.

See *United States* v. *Mayersohn*, 452 F. 2d 521, 528 (C.A. 2), and cases there cited. The trial judge expressly found that the proffered new evidence met none of these tests, and that finding should not be disturbed except in the most extraordinary circumstances. See *Tomley* v. *United States*, 260 F. 2d 468 (C.A. 5); *Apel* v. *United States*, 247 F. 2d 277 (C.A. 8).

Petitioner relies mistakenly upon *Mesarosh* v. *United States*, 352 U.S. 1, in which the government had undermined the credibility of a key government witness by revealing in other proceedings that he had given extensive false testimony which was either perjurious or resulted from a psychiatric disorder. The case at bar, in contrast, involves a matter of mistaken identity of a man whose presence or absence in Chicago on January 19 and 20, 1971, is wholly immaterial to the issue of petitioner's guilt.

6. Also without merit is petitioner's final contention —that disposition of his case by the court below by way of an unpublished "order", which consists of nine printed pages discussing petitioner's claim regarding the sufficiency of the evidence, deprived him of meaningful appellate review. Petitioner has not shown how he was in any way prejudiced by the court's decision not to publish an opinion in this instance. Moreover, Rule 28 of the Rules of the United States Circuit Court of Appeals for the Seventh Circuit, which petitioner challenges (Pet. 4, 56-58), was adopted pursuant to a resolution of the Judicial Conference of the United States. Standards set out in Rule 28 for determination whetеher an opinion will be published provide ample guidelines to insure that important matters of law are published.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1974.

DOJ-1974-01